

AN
E S S A Y
ON THE
N A T U R E
AND
O P E R A T I O N.
OF

FINES AND RECOVERIES.

TO WHICH IS ADDED

THE ARGUMENT

LORD CHIEF BARON YELVERTON,

IN THE CASE OF HUME AND LORD ELY.

IN DOM. PROC. HIE. (WITH REFERENCES.)

By WILLIAM CRUISE, ESQ.

OF LINCOLN'S-INN.

THE THIRD EDITION,

REVISED, CORRECTED, AND ENLARGED.

V O L. I.

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THE ARGUMENT

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IN THE CASE OF HUME AND LORD E.L.Y.

A IN REM. (WITH ANSWERS)

BY WILLIAM CRUISE, ESQ.

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VOLUME 1

PRINTED BY JONES AND GASTON

RECEIVED

P R E F A C E.

THE favourable Reception with which the PROFESSION has honoured the **ESSAY ON FINES AND RECOVERIES**, has induced the Author to exert his utmost Diligence and Attention, to make it still more worthy of their Acceptance,

Although long Experience has established the Doctrine on which these Assurances depend, still the Hopes and Solicitude of Individuals will call for new Decisions. By Fine and Recovery our most valuable Property is transferred, and these Securities will naturally undergo the strictest Scrutiny of those who

P R E F A C E.

are to be benefited or prejudiced by the Conveyance—of the cautious Purchaser, or disappointed Heir. From the Suggestions of Doubt new Cases arise; by these Cases Principles will be enforced, and Distinctions explained, which it is the Duty of a Writer to insert in a comprehensive Treatise. He therefore trusts that the additional Matter to be found in the present Work, will compensate for the Increase of this Third Edition.

The Method adopted in the First Edition has been strictly adhered to, as every Day's Experience has confirmed the Opinion, that the most liberal Mode of treating on a Title of Law is, as on other Branches of Science, by systematic Distribution of general Principles. *If Law be a Science, and really deserve so sublime a Name, it must be founded on Principle,*
and

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and claim an exalted Rank in the Empire of Reason; but if it be merely an unconnected Series of Decrees and Ordinances, its Use may remain, though its Dignity be lessened; and he will become the greatest Lawyer, who has the strongest habitual or artificial Memory. Sir W. Jones's Law of Bailments.

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C O N

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CHAPTER I.

OF THE

ORIGIN AND ANTIQUITY

OF

FINES.

WHEN landed property first became the subject of alienation, it was found necessary to adopt some authentic mode of transfer, which might secure the possession, and evince the title of the purchaser. *(Origin of Fines.)*

By the antient common law, a charter of feoffment was in general the only written instrument, whereby lands were transferred or conveyed; but although this assurance derived great authenticity from the number of witnesses by whom it was usually attested, and the solemn and public manner in which livery of seisin was formerly given: yet still it may be supposed that inconveniencies would frequently arise, either from the loss of the charter itself, or from the difficulty of proving it after a lapse of years. *Wilkins Leg. Sax. 489.*

These circumstances probably induced men to look out for some other species of assurance which should be more solemn, more lasting, and more easy to be proved than a charter of feoffment.

Experience must soon have discovered that no title could be so secure and notorious, as that which had been questioned by an adverse party, and ratified by the determination of a court of justice: and the ingenuity of mankind soon found out a method of drawing the same advantages, from a fictitious process.

To effect this purpose the following plan was adopted: a suit was commenced concerning the lands intended to be conveyed, and when the writ was sued out, and the parties appeared in court, a composition of the suit was entered into with the consent of the judges, whereby the lands in question were acknowledged to be the right of one of the contending parties.

This agreement being reduced into writing was enrolled among the records of the court, where it was preserved by the public officer, by which means it was not so liable to be lost (a) or defaced as a charter of feoffment, and would at all times prove itself; and being substituted in place of the sentence, which would have been given, in case the suit had not been compounded, it was held to be of equal force with the judgment of a court of justice.

Glan. lib. 2.
c. 20. Bract.
256. a & b.

When this species of agreement was completed, a writ issued of course to the sheriff of the county in which the lands lay, in the same form as if a judgment had been obtained in an adversary suit, directing him to deliver the possession to the person who thus acquired the lands.

The form which was first adopted in this kind of assurances has continued ever since; to shew the tenor thereof, and the difference between it, and the charters which were then in use, I shall transcribe it.

Glanv. lib.
8. c. 2.

Hæc est finalis concordia facta in curia Domini Regis apud Westmonasterium in vigilia beati Petri Apostoli, anno regni Regis Henrici Secundi, tricesimo tertio, coram Ranulpho de Glanville, Justiciario Domini Regis, et coram H. R. W. & T. & aliis fidelibus Domini Regis qui ibi tunc aderant, inter priorem & fratres hospitalis de Hierusalem, & W. T. filium Normanum & Alanum filium suum, quem ipse attornavit in curia Domini Regis ad lucrandum & perendum, de tota terra illa & de pertinentiis, de qua terra
tota

(a) There is a record of a fine in Dugdale's *Origines Juridicales*, p. 95. dated 28 Hen. 2. anno 1182. which is expressly mentioned to have been levied, because the charter of feoffment by which the lands had been conveyed was lost.

tota placitum fuit inter eos in curia Domini Regis; scilicet quod prædictus W. & Alanus concedunt & testantur donationem quam Normanus pater ipsius W. ipsis inde fecit, & illam terram totam quietam clamant de se & hæredibus suis domui hospitalis & præfato priori et fratribus in perpetuum, tenenda de domo hospitali & prædicto priore et fratribus in perpetuum & per liberum servitium quatuor denariorum per annum pro omni servitio, et pro hac concessione & testificatione & queta clamantia præfatus prior & fratres hospitalis dederunt ipsi Wilhelmo & Alano centum solidos sterlingorum.

This kind of assurance was called *finis* or *finalis concordia*, from the words with which it began, and also from its effect, which is to put a final end to all suits and contentions. (b) It may be described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and inrolled among the records of the court where the suit is commenced, by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements (c).

To this mode of transferring estates of freehold at common law, the ceremony of livery of seisin is unnecessary; not because the supposition and acknowledgment thereof in a court of record induced an equal notoriety, for no such acknowledgment is made in any of the ancient fines, but because lands acquired in this manner were supposed to be recovered by sentence of a court of justice, and the possession was delivered by the sheriff, in pursu-

B 2

ance

(b) *Et nota quod dicitur talis concordia finalis, eo quod finem imponit negotio adeo ut neuter litigantium ab ea de cetero poterit recedere. Glanv. lib. 8. c. 3. Finis est extremitas uniuscujusque rei, et ideo dicitur finalis concordia quia imponit finem litibus. Bracton*

435.

(c) *Finis primo dicitur ritus ille solennis transferendorum prædiorum in curia regis civilium causarum quo nihil sanctius habetur vel augustius ad alienationes et hæreditates stabiliendas. -- Transactionis igitur coram rege duo erant genera, unum simplici ejus charta enuntiatum et testatum, aliud tamquam e composita lite proveniens rei judicata formam exhibet ideoque finis dictum quasi litis terminus. Sed genus alterum (qui finis dicitur et finalis concordia) magis placuit quod præter testationis magnificentiam, non solum ad stabiliendas transactiones, sed ad rescindendas lites maxime valet, ideoque ab emptoribus terrarum tanquam sacra anchora culta et admirata. --*
Spelman's Gloss. voce Finis.

(ance of a writ directed to him for that purpose, which was equal in point of notoriety to the ceremony of livery.

Glanv. l. 1.
c. 3. lib. 8.
c. 3, 4, 5.

A fine was from its first institution more highly favoured and protected by the law than any other kind of conveyance: for, if either of the parties refused to adhere to it, there was a particular writ by which they were compelled to appear, called a *Querela de fine facto in curia Domini Regis non observato*. And, if the fine was proved to have been duly levied, then the party who refused to adhere to it was attached, until he found sufficient security for his compliance (d)

Fines taken from the civil law.

Voet. Comp. Jurisf. p. 51.

The idea of a fine seems to have been originally taken from the *transactio* of the Civilians, which was an accommodation of a suit, or an agreement respecting some doubtful matter that would otherwise become the subject of a suit. *Transactio est super re dubia aut lite incerta conventio, non gratuita aliquo dato retento vel promisso*.

Bract. fo. 310. a & b.

Although no writer on the *English* law has taken notice of this circumstance, yet the following passage from *Bracton*, seems to be an undoubted proof of it.

Vid. Glanv. Prolog. & lib. 7. c. 1. Selden ad Fletam, Barrington Obs. on the Statutes. Reeves 358.

Concordia in foro seculari idem est quod transactio, et est transactio de re dubia et lite incerta aliquo dato vel promisso vel retento a lite transactio.

From the similarity of these definitions, it appears clearly, that the *English* lawyer copied from the *Roman*, nor should it appear extraordinary, that we are indebted to the civil law for this most useful species of assurance, when we consider how much our first writers, *Glanville* and *Bracton*, have borrowed from *Justinian's* code; although some of the more modern authors appear either to have been ignorant of the obligations we owe to the *Romans* in this respect, or have from a mistaken pride been extremely unwilling to acknowledge them (e).

The

(d) In some cases, however, the civil authority was insufficient for this purpose. Thus Mr. *Madox* has transcribed a record, by which it appears that *Julian de Swadesfeld*, fined to the king *John* in 100 marks and six palfreys, *per se quod finis factus per cyrographum et per finem duelli, inter ipsum, et Willelmum de Curton, de feodo unius militis et dimidii cum pertin: in Ellingham, coram justiciariis teneatur.*

(e) Sir *Edward Coke* seems not to have been totally ignorant of the origin of fines; for speaking of their etymology, he says, "And
" the

The *English* were not the only people who adopted the *transactio* of the civil law, for the *French* seem to have felt very early the superior efficacy of this kind of contract over every other, and therefore introduced it into their law.

On nomme *transaction* les actes qui ont pour objet de terminer ou prévenir des procès auxquels les droits respectifs pouvoient donner lieu. Denisart Coll. de Decisions.

Il n'y a point de conventions plus solides ni d'engagemens plus respectables que ceux garantis par une transaction sur procès: les loix les adoptent et les protègent. Parcequ'elles sont importantes à la société; et que leur but naturel est, de délivrer les parties du trouble que produit l'événement des procès, de faciliter les reconciliations, d'assurer le sort et l'état des citoyens, et de tarir la source de toute dissension. Encyclopedie Transaction.

Quelque fois la transaction se faisoit au parlement même comme on voit au second registre olim fo. 25. vo. ou il est dit. *Hæc est concordia facta, anno 1298, inter Petrum Episcopum Alstifodorensium et Procuratorem Comitum Alstifodorensis.*

No traces of a *transactio* or fine are to be found in the original customs of the duchy of *Normandy*, but it seems to have been introduced very early into their law, for in the *Coutume reformée de Normandie*, which was compiled in the year 1583, mention is made of a *contrat de transaction*, as a thing well known and in common use (f). Bafnage, vol. 2. p. 346.

It has been a favourite topic with our lawyers to enlarge very much on the antiquity of fines; some have carried this idea so far as to insist that they were coeval with the first Antiquity of Fines.
Coke Read.
on Fines, 1.
Plowd. 368 p.

“ the civilians call this judicial concord *Transactio nem judicialem de re immobilis.*” 1 Inst. 262. a.

(f) Agreements in the nature of fines were formerly known in *Scotland*.—“ In difficult or intricate cases it was an early practice for judges to interpose, by pressing a transaction between the parties; of which we have some instances in the Court of Session, not far back. This practice brought about many agreements betwixt litigants, which were also recorded in the court where the process depended. The record was complete evidence of the fact; and if either party broke the concord or agreement, a decree went against him without other proof. The singular advantages of a concord or transaction, thus finished in face of court, moved individuals to make all their agreements of any importance in that form. And indeed, while writing continued a rare art, skilful artists, except in courts of justice, were not easily found, who could readily take down a covenant in writing.” *Lord Kaims's Law Tracts*, 65.

first rudiments of the law, and formed an original conveyance or assurance. Others have contended, that fines were well known in this kingdom before the *Norman* conquest (g); but if it be admitted that the first idea of a fine was derived from the civil law, and we trust this fact has been fully proved; it will follow, that fines could not possibly have been known in *England* until some time after the year 1130, when a copy of the *Pandects* was found at *Amalphi*, in *Italy*; in consequence of which discovery the study of the *Roman* law spread with uncommon rapidity over all *Europe*, not excepting this island, in which *Roger*, surnamed *Vacarius*, who was brought over by *Theobald*, a *Norman* abbot elected to the see of *Canterbury* so early as the year 1147, read public lectures at *Oxford* on the *Roman* law.

Selden ad
Fletam, ch.
7. f. 3.

Dugd. Orig.
Jurisdic. 92.
Madox. Diff.
to the Form.
Angl. f. 15.

As a farther proof of this assertion it may be observed, that *Dugdale* and *Madox*, the two most diligent and learned inquirers into our antient records and charters, have acknowledged, that they could not discover any traces of fines in this country before the reign of *Henry II.* who ascended the throne of *England* in the year 1155, which was eight years after *Vacarius* had publicly taught the *Roman* law at *Oxford*: and *Glanville*, in whose time fines were fully established, is not supposed to have written before the year 1181, that is thirty-four years after the introduction of the *Roman* jurisprudence, so that there can scarce remain a doubt but that fines were first adopted in *England*, during the reign of *Stephen*, or his immediate successor, *Henry II.* And that we are indebted to *Justinian's* code for this part of our law.

(g) It was not unusual in the *Anglo-Saxon* times for persons to execute their contracts in the county court where they were witnessed, of which *Hicks* in his *Dissertatio Epistolaris*, p. 29, 30. published in the *Thesaurus Linguarum Septentrionalium*, has produced two instances, but they bear no sort of resemblance to fines.

CHAPTER II.

Of the Manner of Levying a Fine, and its different Parts.

A FINE has in the preceding chapter been described *Antient manner of levying a fine.* to be, an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and inrolled among the records of the court where the suit was commenced; by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements.

There is no small difficulty in ascertaining the manner in which fines were originally levied, on account of the scarcity of materials for such an inquiry; for except what is to be found in the dissertation which *Madox* has prefixed to his collection of antient charters, and the few observations which *Dugdale* in his *Origines Juridicales* has made on this subject, nothing has been collected either by our lawyers or antiquaries.

Madox seems to have thought, that a fine was not originally an accommodation of a suit in the strict sense of the word, because in some of the most antient fines extant, no original writ appears to have been sued out, nor any process used for the purpose of bringing the parties before the court: but they themselves having accommodated the matters in dispute, and drawn up an agreement in writing called a *chirographum*, which signified a deed of two parts written on the same paper or parchment, ^{1 Inst. 143.} they then appeared in a court of justice, where they acknowledged it as their agreement, and mutually set their ^{b. n. 4.} seals to it; and upon payment of a certain fine it was in- ^{Fleta l. 3, c. 14. f. 3.} rolled among the records of the court. Or else the parties entered into an agreement in court, where it was immediately reduced into the form of a *chirographum*, ^{3 Rep. Pref.} and recorded, a copy of which was delivered to each of the parties.

This idea is confirmed by the opinion of the judges in the abbot of *Merton's* case, who said that a fine was no- ^{Year Book Pasch. 21 Ed. 4. fo. 4. no. 8. Mich. 21} thing

Ed. 4. fo. 69. thing more than a covenant between the parties, and recorded by the justices, and if it were before justices of record, the parties being present, it was sufficient, for the writ was sued out only to make the parties appear, and if they were present and would appear gratis, it was unnecessary to sue out a writ, but they might make a final covenant of record, from whence it may be contended that fines were at first exactly similar to the agreements which in the time of the *Anglo-Saxons* were entered into at the county courts. But a fine is distinguished from those agreements by two very material circumstances, first, nothing appears to have been paid for permission to enter into such a contract, and secondly, it was not enrolled among the records of the court.

It may also be observed that this mode of levying a fine without an original writ agrees exactly with the *transactio* of the civil law, which was not always an accommodation of a suit actually commenced, but an agreement relating to some doubtful matter, which must otherwise have become the subject of litigation. *Objectum sive materia transactionis sunt res dubie vel litigiosæ, de quibus scilicet vel nunc lis fit, vel in futurum esse possit, aut metuatur, nam litem motam esse nihil necesse est.*

Vinnius
Tract. de
Transf. c. 4.
n. 1.

The observation of the judges in the abbot of *Merton's* case, may also be accounted for on another principle. An original writ was not absolutely necessary in *Bracton's* time to the commencement of a suit, for if the defendant would appear in court without a writ, the judges might proceed in the suit, *tot erunt formulæ brevium quot sunt genera actionum, quia non potest quis sine brevi agere, cum non teneatur alius sine brevi respondere nisi gratis voluerit, et ex hoc ei non injuriatur, cum scienti et volenti non fit injuria.*

1 Reeves 66.

Lib. 2. c. 34.

The law was however soon altered in this respect, for when *Fleta* wrote, an original writ was become absolutely necessary:—thus in speaking of the court of common pleas, he says—*Habet etiam curiam suam et justiciarios suos residentes qui omnes recordum habent in his quæ coram eis fuerunt placitata, et qui potestatem habent de omnibus placitis et actionibus realibus et personalibus et mixtis, dum tamen warrantum per breve regis habuerint cognoscendi, nam sine warranto jurisdictionem non habent neque coercionem.*

It seems however to have been very soon established that no fine could be levied, unless upon a *placitum* or suit actually commenced in the usual manner, for *Glanville*

ville describes a fine to be an accommodation of a suit actually commenced. *Contingit autem multotiens loquelas metas in curia domini regis per amicabilem compositionem et finalem concordiam terminari, sed ex consensu et licentia domini regis, vel ejus justiciariorum undecunque fuerit placitum, sive de terra sive de alia re.* It even appears that so early as the reign of Henry III. there was a particular placitum adapted to the purpose of levying a fine; thus *Madox* has transcribed a fine levied in the 27 Henry III. between *Ranulph*, abbot of *Ramsay*, and *Matthew de Leyham*. *Unde placitum finis facti summonitum fuit inter eos in eadem curia* (a) Glanv. l. 2. c. 1. Differt. f. 17.

By the statute *de modo levandi fines*, 18 Ed. I. §. 4. the manner of levying fines was ascertained; and it was enacted, that no fine should thenceforth be levied unless upon a suit actually commenced in the usual way. So that a fine then became an accommodation of a suit in the most strict and technical sense; and was of no force unless an original writ was really sued out: and since the passing of that statute no material alteration has been made in the manner of levying fines.

A fine now consists of five parts. 1. The original *Different* writ. 2. The *licentia concordandi*. 3. The concord. 4. *parts of a fine.* The note. and 5. The foot.

When the parties have agreed to levy a fine, the person to whom the land is to be conveyed, commences an *Original writ.* 2 Comm. 349.
action

(a) It was formerly a common practice for persons who had any cause of dispute, to appear before Parliament, and there to enter into an agreement concerning the matter in debate, to which they mutually promised to adhere. Although these agreements are called *concordia*, yet they are clearly distinguishable from fines, for in the several agreements of this kind, which are to be found in the rolls of Parliament, no mention is ever made of a suit depending between the parties at the time, nor does any fine appear to have been paid on such occasions; the words of these concords are "*tandem ad instantiam domini regis ad istud parliamentum suum qui omnes contentiones vult pacificare partes predicti se in hunc modum concordarunt videlicet, &c.*" Rot. Parl. 18 Edw. I. No. 2. No. 21. 20 Ed. I. No. 33.

This kind of agreement was also frequently called *charta conventionis*, of which there are several made between the kings of England and foreign princes, in the *Liber Niger Scaccarii*, published by *Hearne*; and one which is intitled *charta conventionis & finis facti inter Henricum regem Anglorum filium Matilda Imperatricis & Willelmum regem Scotorum*.—The using of the word *finis* in this charter is not easily accounted for.

action or suit at law against the vendor, by suing out a writ of covenant against him, the foundation of which is a supposed agreement or covenant, that the vendor shall convey the lands to the purchaser: on the breach of which agreement the action is brought.

As no suit can be commenced, in any of the courts of common law without an original writ, and as a fine is a friendly composition of a suit actually commenced; it follows, that no fine can be levied without an original writ. And the statute *de modo levandi fines* expressly says, "that the order of the common law will not suffer a fine to be levied in the king's court without an original."

Co. Read. 10. However, if the judges permit a fine to be levied without an original writ, it is not absolutely void, but only voidable by writ of error.

5 Rep. 39. a. A fine may be levied on every writ by which lands may
Shep. Touch. be demanded, charged, or bound, or which in any sort
4. (b) Salk. concerns land; such as a writ of mesne, *warrantia char-*
340. Rep. *te, de consuetudinibus et servitiis, &c.* But a fine cannot
Temp. Holt. be levied on an original in a personal action.
322.

A fine may be levied of an advowson in a writ of right of advowson, of which *Madox* has given an instance of great antiquity.

Reg. Brevium The writ on which fines are now usually levied, is a
165. writ of covenant, which is in the realty, and lies where
Fitzh. N. B. a man covenants to levy a fine to some other person of his
146. lands and tenements.

No form of a writ of covenant is to be found in *Bracton* or *Fleta*, but in the *statutum Walliæ*, 12 Ed. 1. we find the following: *Præcipe A. quod justè et sine dilatione teneat B. conventionem inter eos factam de uno messuagio, &c.*

2 Inst. 511. In suing out a writ of covenant, there is a fine due to the king, called the *primer-fine*; for in every real action for lands and tenements, of the yearly value of five marks, there is a fine of six shillings and eight pence due upon the original in the Hanaper Office.

Where the sheriff of the county in which the lands lie, is a party to the fine, the writ ought to be directed to the coroner; for although the sheriff is the proper officer
Smethier v. Leigh, Cro. Car. 415.
1 Roll. Ab. 297.

(b) The references made to *Sheppard's Touchstone*, are to the last edition of that valuable work, which has been lately published by Mr. *Hilliard*, with a great number of useful notes.

officer to execute all writs, yet, where the writ is brought against himself, to prevent partiality it is the practice to direct the writ to the coroner, with this clause, *Quia prædictus A. B. est vicecomes comitatus D. fiat executio brevis prædictæ per coronatorem, ita quod vicecomes non se intromittat.*

If an original writ be countermanded by a *retraxit*, a Co. Read. fine cannot afterwards be levied on it. Thus in an ¹⁰ Bro. Ab. affize, the plaintiff appeared and made a *retraxit*; afterwards the judges recorded an agreement between the parties in the nature of a fine: and by the better opinion it was void, *et coram non judice*; because, when the agreement was made, there was no suit depending, the writ being determined by the *retraxit*. ^{Tit. Fine, P. 82.}

Formerly, if the king had died immediately after the purchase of the original writ, the parties could not proceed to levy a fine on it; because, by the death of the king, it was abated. But it is now otherwise; for, by the statute, *1 Ann. c. 8. s. 5.* no original writ, process, or proceedings whatsoever, shall abate by the death of any king or queen. ^{Bro. Ab. Tit. Fine, 85, 124.}

The second part of a fine is the *licentia concordandi*; *Licentia Concordande.* for as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepting them, but having given pledges to prosecute his suit, applies to the court for leave to make the matter up, which is readily granted on payment of a second fine. ^{2 Comm. 350.}

This fine is called the king's silver, and is paid on obtaining the *licentia concordandi*, because the king by such composition loses the fines, amerciaments, and other advantages that would have accrued to him upon the judgment or nonsuit, which in antient times formed no inconsiderable part of his revenue. ^{2 Inst. 511.}

The king's silver, which is sometimes called the post-fine, with respect to the primer-fine due on the original writ, is an antient revenue of the crown, and is as much as the primer-fine, and half as much more. ^{2 Inst. 511.}

Formerly the post-fine or king's silver was paid at the king's silver office; but by the statute *32 Geo. 2. c. 14.* it is enacted, *s. 1.* "That on every writ of covenant which shall be sued out for passing of fines in the Common Pleas at *Westminster*, the officer, whose duty it is
" to

“ to set and indorse the pre-fine payable thereon, shall,
 “ at the same time, set the usual post-fine, and indorse
 “ the same on the back of the said writ, together with
 “ his name or mark of office, in like manner as the
 “ same are now indorsed at the king’s silver office;
 “ which post-fine shall be forthwith paid to the receiver
 “ of pre fines at the Alienation Office, with 4*d.* as his
 “ fee for receiving the same, instead of his fee of 4*d.*
 “ charged on lands and hereditaments, and payable to
 “ sheriffs, bailiffs, and others, on discharging the same,
 “ by 3 *Geo. 1. c. 15.* which fee of 4*d.* by the said act
 “ granted, after the first day of Trinity term 1759, shall
 “ cease; and such receiver shall indorse upon the back
 “ of every such writ of covenant one mark of office,
 “ as is now used by him on the receipt of pre-fines at
 “ the Alienation Office, with the name of such receiver,
 “ and the sum received as the post-fine, which mark of
 “ such receiver shall discharge the manors, lands and he-
 “ reditaments comprised in the said writ of covenant,
 “ and the cognizees named therein.

“ *Sect. 2.* The officer or clerk of the king’s silver
 “ office, or his deputy, shall continue to enter every fine
 “ upon record, in the way hitherto used, and make the
 “ same entries, and put thereon the same indorsements,
 “ with the same mark, and in like manner as has hi-
 “ therto been the practice of the said office in passing
 “ fines; and no fine, until the same be marked with the
 “ sum to which the post-fine amounts in the king’s silver
 “ office, shall be effectual in law.

“ *Sect. 3.* Where no pre-fine is payable on any writ
 “ of covenant, (*viz.* where the lands are under the
 “ yearly value of five marks), the officer at the Aliena-
 “ tion Office, whose duty it is to set pre-fines, shall set
 “ on every writ of covenant brought to the said Aliena-
 “ tion Office, on which no pre-fine is payable, a post-
 “ fine of 6*s.* 8*d.* and shall indorse such post-fine of 6*s.* 8*d.*
 “ on every such writ of covenant, with his name and
 “ mark of office, as it has been usual; and every such
 “ post-fine of 6*s.* 8*d.* shall be paid to the receiver of the
 “ Alienation Office before the writ of covenant, on
 “ which no pre-fine is payable, be passed at the Aliena-
 “ tion Office; and the receiver on payment of the said
 “ 6*s.* 8*d.* shall indorse and mark every such writ of cove-
 “ nant

"nant as other writs of covenant are by this act directed to be indorsed.

"*Sect. 4.* The officer or clerk of the king's silver office, or his deputy, after the first day of Trinity term, 1759, shall not receive any writ of covenant, unless it appear by the mark and indorsement of such receiver, that the post-fine has been paid.

"*Sect. 5.* If, after the payment of such post-fine, the writ of covenant, by the death of any of the parties, or other cause, be prevented from passing through the several other offices, so as the said fine is not completed, then the said receiver shall repay to the cognizees, or their attorney, on producing and filing with him, the said writ of covenant, every such sum as has been before by him received for the post-fine; and such writ of covenant so remaining, filed with such receiver, shall be a discharge to such receiver."

The king's silver is entered on the writ of covenant in the following manner: *Robertus Drury arm. dat Dominæ Reginae septem libr. pro licentia concordandi cum Thoma Tey arm. et Eleonora uxore ejus, de placito conventiōnis de maneriis, de, &c. et habet chirographum per pacem admissum, coram Jacobo Dier.* And such entry ought to contain, 1. The sum given for licence to compound. 2. The party who pays it, (that is to say), the person in whom the fee is to be vested. 3. The plea, and between whom. And, 4. The lands for which the fine is paid.

If any of the parties die before the king's silver is entered, the fine is in general void; because the king's silver being paid for permission to accommodate the suit, the agreement of the parties cannot be considered as lawful until this fine is entered; and consequently if the demandant or tenant dies before this is done, the fine will have no effect, being similar to a judgment given in an adversary suit after the death of one of the litigating parties.

When a year and a day has elapsed from the date of Barnes, 4to. the caption, or acknowledgment of a fine, without entering the king's silver, an affidavit must be made, that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. And now that the king's silver is paid at the Alienation Office, if a year elapses before the fine is carried to the Gregory v. Croucher, king's Barnes, 215.

king's silver office, an affidavit must be made that the parties were alive when the king's silver was paid.

The third part of a fine is the concord or agreement entered into openly in the court of Common Pleas, or before the Chief Justice of that court, or commissioners duly authorised for that purpose, which is the foundation and substance of the fine. It is usually an acknowledgment from the deforciant, or those who keep the others out of possession, that the lands in question are the right of the demandant; and from the acknowledgment or recognition of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied the cognizee.

The form of the concord is thus: "And the agreement is such, to wit, that the aforesaid *A.* (the deforciant in the original writ), hath acknowledged the aforesaid manors, lands, tenements, and hereditaments, with the appurtenances, to be the right of him the said *B.* (the plaintiff or demandant), and those he hath remised and quit-claimed from him the said *A.* and his heirs, to the aforesaid *B.* and his heirs for ever. And moreover, the said *A.* hath granted for himself and his heirs, that he will warrant to the aforesaid *B.* and his heirs the aforesaid manor, lands, tenements, and hereditaments, with the appurtenances against him the said *A.* and his heirs for ever."

By the common law, the cognizor seems to have been bound to warrant the lands to the cognizee, although no express words to that purpose were inserted in the fine.

Bract. 389. a. *Item sufficit finis factus in curia Domini Regis, licet expressa warrantia vel homagium et servitium non intervenerit, dum tamen constiterit per finem et chirographum, quod ille qui tenet tenere debeat de eo qui vocatur ad warrantum.*
Idem. 392. a. But in course of time it became the practice to annex an express warranty to all fines, which is still continued.

Farmer's case, Hob. 330. It has long been the practice for the cognizor to make the cognizance (that is) to acknowledge the concord of the fine, before any original writ has been sued out, and this custom has so far prevailed, that the judges have uniformly supported such fines; but in all cases of this kind, an original writ must be sued out and made returnable on some day previous to that on which the concord is acknowledged; a *licentia concordandi* must also be obtained,

obtained, and the king's silver must be regularly paid and entered, for these circumstances are still absolutely necessary to complete the fine.

By the statute, 23 *Eliz. c. 3. f. 5.* It is enacted, "That every person that shall take the knowledge of any fine, or shall certify them, shall, with the certificate of the concord, certify also the day and year wherein the same was knowledged. And that no clerk or officer shall receive any writ of covenant, whereupon any fine is to pass unless the day of the knowledge of the same fine shall appear in, or by such certificate, upon pain that every clerk that shall receive any such writ shall forfeit for every time that he shall so offend, the sum of five pounds."

The concord of the fine comes in lieu of the sentence which would have been given in case the parties had not compounded the cause; and is, therefore, exactly of a similar nature, and attended with the same consequences as a judgment in an adversary suit. Rule respecting the concord.

Thus the cognizance must be made of those things only, and to those persons only who are named in the original writ on which the fine is levied; because the cognizance being in the nature of a judgment binds only those persons and things which are judicially before the court. Co. Read. 6.

This rule however admits of a few exceptions, for a remainder may be limited in the concord of a fine, to a person not named in the original writ, in the same manner as a remainder may be limited in a deed to a person who is not a party to it. Co. Read. 6.

If a *præcipe* be brought against a tenant for life, and upon his default the person in reversion is received, he may levy a fine of his reversion to the demandant, although he is not named in the original writ. Co. Read. 11.

In the same manner if a fine is levied by a vouchee to the demandant, or by a demandant to the vouchee, it will be good; but a fine levied by a vouchee to a stranger is void. 3 Rep. 29. b.

The reason of the two last cases is, because the person in reversion and the vouchee are allowed by the court to come in the place of the tenant against whom the *præcipe* was originally brought, and having thus been made parties

ties to the suit, they are bound by the judgment, as much, as if they had been named in the original writ.

Bro. Abr.
Tit. Fine 7.
5 Rep. 38. b.
Co. Read. 8.

The object of fines being to settle the possession, not only for the present but for ever, in the most certain and secure manner, the judges never allow lands to be limited in the concord of a fine to two persons and their heirs, but always direct the lands to be limited to the two persons and to the heirs of one of them.

Robinson's
Gavelkind
132.

The necessity of the case however requires that where the lands comprehended in the fine are held by gavelkind tenure, this rule should be dispensed with; and therefore when a fine is levied of lands held in gavelkind, the judges will permit them to be limited to two or more persons and their heirs.

Co. Read. 3.
Rob. Gav.
132.
Bro. Abr.
Tit. Fine 65.

A warranty ought not to be allowed in the concord of a fine from two persons and their heirs for the same reason; but a warranty has been allowed from three persons and their heirs where the estate was held in gavelkind.

2 Rep. 74. b.
5 Rep. 38. b.

The judges ought not to permit a fine to be levied upon condition, nor should a saving, or exception, or a clause of re-entry be allowed in a fine. But let it be observed, that if a fine is actually levied to two persons and their heirs, or with a warranty from two persons and their heirs, or upon condition, with a saving, exception, or clause of re-entry, such a fine will notwithstanding be valid upon the principle that *feri non debuit sed factum valet, et facta tenent multa quæ feri prohibentur*. And *Plowden* has given some instances of fines levied on condition which were allowed to be good.

12 Rep. 125.
Plowd. 34.

The *concordia facta in curia* is the complete fine, and therefore if after the concord is acknowledged in court, one of the cognizors dies, still the cognizee may proceed with his fine against the surviving cognizor.

Ersfield's
case, Hobart
329.

Thus where two brothers acknowledged the concord of a fine before Lord Chief Justice *Hobart*, and then the elder brother died; several motions were made for the proceeding and staying of the fine; but the Chief Justice was clearly of opinion, that the cognizee might proceed with his fine as against the surviving brother, and take out his writ of covenant accordingly; the death of the elder brother being no impediment, for the acknowledgment of each person was good against himself, and should operate for as much as he could pass.

A fine

A fine was stopped at the king's silver office for want of an affidavit that the parties were living, a year having elapsed since the acknowledgment; and one of the cognizors being dead, application was made to the judges that he might be struck out, and that the fine might pass as to the other cognizor. The motion was denied, but a rule was made that the surviving cognizor should shew cause why the fine should not pass generally as to all the parties; and upon affidavit of service the rule was made absolute.

Lands situated in different counties may be contained in the same concord, but there must be several writs of covenant. 2 Inst. 512.
Dyer. 227.

Formerly lands purchased of different persons were allowed to be comprised in the same concord, and every vendor warranted against himself and his heirs only. But by an order of the Lord Chancellor *Hatton*, reciting, that by these kinds of fines her majesty was defrauded of the profit of her post-fines, and of the seals on writs, and the chancellor and other officers lost their fees, the curfitors are authorised to stay a writ where there is more than one demandant and one deforciant, except coparceners, joint-tenants and tenants in common. But the curfitors will permit two separate purchases to be comprised in one fine, on an affidavit that the value of both together, does not exceed two hundred pounds. Wilson 47.

The remaining parts of a fine are, first the note, which is only an abstract of the writ of covenant, and the concord, naming the parties, the parcels of land and the agreement. And secondly, the foot, chirograph or indenture of the fine, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made or ingrossed at the Chirographer's Office and delivered to the cognizor and cognizee, beginning with these words—*Hæc est finalis concordia*, and then reciting the whole proceeding at length; thus the fine is completely levied at common law. Note and Foot or Chirograph. 2.
Comm 351.

There are two petitions of the Commons in the rolls of parliament, 4 Hen. 4. No. 35. and 5 Hen. 4. No. 28. stating, that many fines of land remaining in the king's treasury, and the notes of such fines remaining in the court of Common Pleas, had been taken away, and other

C

All the proceedings on fines must be recorded.
Rot. Parl. vol. 3. 495.
fines 543. 557.
558.

finer and notes of fines counterfeited and put in their places, whereby many persons were disinherited; in consequence of which, a statute was immediately passed, 5 Hen. 4. c. 14. enacting, that all the proceedings on fines, both previous to, and at the acknowledgment thereof, should be enrolled of record in the court of Common Pleas. And by the 23 Eliz. c. 3. f. 1. and 6. it is enacted, that every writ of covenant and other writ, whereupon any fine shall be levied, the return thereof, the writ of *dedimus potestatem* made for the knowing of any of the same fines, the return thereof, the concord, note and foot of every such fine, the proclamations made thereupon, and the king's silver, may, upon the request or election of any person, be enrolled in rolls of parchment, and that the enrolments of the same, or of any part thereof, shall be of as good force and validity in law, to all intents, respects, and purposes, for so much of any of them so enrolled, as the same being extant and remaining, were or ought by law to be.

Co. Read 1.

A fine is said to be ingrossed when the chirographer makes out the indentures, and delivers them to the parties. But it is not absolutely necessary that a fine should be ingrossed; provided it be recorded; for Sir Edward Coke observes, that a fine is a perfect record before it is ingrossed.

A fine may be ingrossed at any time after it is levied.

Sir J. Brome's
case 4. Leon.
90. Dyer 255.
a.

Sir John Brome, in 33 Hen. 8. acknowledged a fine of certain lands. The king's silver was entered, and the cognizance taken; and in 29 Eliz. the person who claimed under this fine came into court, and prayed that the fine might be ingrossed, it appearing upon examination, that the party to whom the fine was levied was seized after the fine, and suffered a common recovery of the land, which had been enjoyed according to the said fine ever since: the court ordered the fine to be ingrossed.

2. Leon. 183.
case 454.
Godb. 103.

The record of the fine which remains in the possession of the chirographer is the *principale recordum*; so that if there is any difference between it and the record which remains with the *custos brevium*, that which continues with the chirographer is considered as the true record.

Gillb. Evid.
24. Buller
1. P. 229.

The chirograph of a fine is evidence to all persons and in all courts of such fine; because the chirographer being an officer appointed by the law for the purpose of transcribing

cribing fines from the record, his copies must be allowed to be authentick.

The office of the chirographer of fines was burnt down in the year 1679, whereby several records of fines which had been levied in *Trinity* and *Michaelmas* term preceding, were either burnt or lost. In consequence of which, an act was passed, 31 *Car. 2. c. 3.* reciting, that the fines so burnt or lost had duly passed all the offices; so that by the records of the king's silver, the notes of the cursitor who made out the writs of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy, &c. the full contents of all such fines would appear. But for want of the records of the fine, so burnt or lost, purchasers and others, whose titles were secured under the said fines, were in danger of having the same impeached. It was therefore enacted, that the said chirographer or his deputy should, before the end of the next *Trinity* term, upon oath certify to the Justices of the Common Pleas, a note of all such fines entered into the said book kept by the said deputy, that he, upon diligent search should find, were either burnt or lost, by reason of the said fire; which certificate should be in parchment, fairly written, and a copy thereof set up in *Westminster-Hall*, &c. and that any time within three years the Chief Justice of the said court of Common Pleas, together with any one or more of the Justices of the said court, should have power to send for any officer's books, records, &c. and upon full examination of any such fine, the records whereof were burnt or lost, should direct the said chirographer or his deputy to new engross the note and foot of such fines without fee, and to carry the same before the said Chief Justice, and such other of the said Justices as shall have taken the examination concerning the burning or loss of such fine, who were required to subscribe their names at the bottom of the said note and foot, and every such fine, whereof the record should be so new engrossed, should be of the same force and effect, as if it had still remained upon record unconsumed or not lost.

Applications are sometimes made to the court of Common Pleas to prevent fines from being completed, on a suggestion that the parties are disabled by law from levying such fines.

Of motions to prevent fines from being completed.

Wilson 96.

By a rule of court made, *Hill. 28*, and *29 Car. 2.* all persons making any complaint against fines acknowledged by infants, feme coverts without the consent of their husbands, or persons of *non sane memorie*, or otherwise disabled by law, to acknowledge the same, or by any person in the name of another, or by the like deceit, and obtaining rules for the staying of such fines, shall from term to term, so long as they shall expect benefit or observance of such rules, enter and continue the same rule for that term, or leave copies thereof with the *custos brevium*, clerk of the king's silver, and chirographer, that the same may thereby be the better taken notice of; or, in default thereof, the said officers, or any of them, shall not stand farther obliged thereby.

And all persons concerned in the obtaining or prosecuting such rules, for the staying of such fines, so levied as aforesaid, their attorneys or clerks, are thereby enjoined every term to search and see the books and entries of fines with the clerk of the king's silver, or other officer, where entries are kept for that purpose.

By a rule of court made, *Pasch. 29 Car. 2.* all manner of *caveats* and orders for the stopping any fines shall be renewed every term, and copies thereof left with the clerk of the king's silver, for which he is to demand only his antient fee of 3s. 4d. the term; and, in default thereof, all *caveats* that shall not be so renewed, shall lose their force and be void.

By a rule of court made *Easter, 9 Ann.* no fine whatsoever taken and acknowledged before the Chief Justice, or any judge of assize, or serjeant at law, if the date of the caption of such fine shall appear to have been razed, shall for the future pass the queen's silver office, and the queen's silver of such fine be recorded by the said clerk of the queen's silver, before there be an order under the hand of the said Lord Chief Justice, or some other justice of this court, for his passing and entering such fine, first had and obtained.

No averment
can be made
against the
chirograph of
a fine.

2 Inst. 260. a.

It is a principle of the common law, that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question; so that no averment can be made against any fact which is once upon record; and therefore, when the foot or *chirographum* of a fine is recorded, no averment can be made

as to the caption or time of its acknowledgment, but it must be considered as a fine of that term in which it is recorded, nor can it be falsified, until it is vacated or reversed by the court of Common Pleas.

Thus, where *Nathaniel* Lord Viscount *Say* and *Sele* being tenant in tail of the premises in question, with remainder over, levied a fine in *October* 1701, and, in *Michaelmas* term following, suffered a recovery: and, to prove this, the chirograph of a fine was produced, importing, that *Nathaniel* Viscount *Say* and *Sele* levied that fine on the 23d *October* 1701, and the exemplification of a common recovery was also produced, which appeared to have been suffered on the 18th *November* 1701; the question was, whether the cognizee of the fine had the freehold in him when the recovery was suffered?

It was insisted by the plaintiff's counsel that he had not; for that the fine given in evidence to make him so, was not in fact acknowledged, until the 2d of *March* 1701, which was four months after the recovery was suffered: and, to support this fact, they offered to produce, and prove, 1. the record of the recognizance, or acknowledgment of the fine, under the hand of the Lord Chief Justice *Trewor*, whereby it appeared, that the acknowledgment thereof was made and taken before the said Lord Chief Justice on the 2d day of *March* 1701, and not before. 2. That the acknowledgment of the fine was the very true acknowledgment or recognizance of the concord upon which the fine given in evidence passed, and upon which the chirograph of that fine was made and ingrossed. And, 3. they offered to produce the files of the Court of Common Pleas of the acknowledgments of all fines in *Michaelmas* term 1701, whereby it would appear that Lord *Say* and *Sele* did not acknowledge any fine whatsoever, of or in that term, at any time before the suffering the common recovery. But the Court of Queen's Bench refused to admit any of the matters offered against the fine to be given in evidence, being of opinion, that no proof or evidence of the time of the acknowledgment of a fine ought to be admitted, contrary to, or against the chirograph thereof; and that the record, which is the chirograph of the fine, cannot be falsified until it is vacated or reversed.

From

Ante, p. 18.

From this judgment a writ of error was brought in the House of Lords; and one of the errors assigned was, because the records, and matters offered to be given in evidence, were not admitted or allowed by the court to be given in evidence to prove the true time of acknowledging the fine: in support of which it was insisted, that as the fine was not in fact acknowledged until the 2d of *March*, it could not transfer the freehold of the lands to the tenant to the *præcipe*, three months before the time of that acknowledgment; and that the plaintiff was admitted to the proof of this fact, by the statute 23 *Eliz. c. 3. s. 5.* which directs, that the time of the acknowledgment shall be certified by those who take such acknowledgment; for if a man cannot give in evidence the time of acknowledging a fine, in order to avoid deceit imposed upon him by that fine, this statute would answer no purpose.

Vide infra, c.
15.

On the other side it was contended, that the caption of the fine ought not to be admitted against the record or indenture of the fine; for it would shake all family-settlements, and introduce the greatest uncertainty and confusion in all conveyances by fines, upon which the most considerable estates in the kingdom depended; and that an attempt to set aside a fine upon evidence was never before made. That, in the indentures of all fines, the concord is recorded to be made in court; whereas the captions of the acknowledgments of all fines (except a very few) are taken out of court, either before the Lord Chief Justice of the Common Pleas, or Commissioners in the country; and, upon a writ of error, no error can be assigned in the caption varying from the record, as that would be an error contrary to the record: but if in the present case the fine was irregular, the proper method was to apply to the Court of Common Pleas where the same was levied, and not attempt in a summary way to invalidate it by evidence in ejectment. The judgment was affirmed.

Of the Pro-
clamations.

When fines became a general mode of assurance, it became necessary to render the levying of them a matter of the most public notoriety, on account of those whose rights might be barred by not making their claim in due time. For this purpose it was enacted, by the 27 *Ed. 1. c. 1.* that the notes of all fines should in future be openly read in the Court of Common Pleas at two certain days in
one

one week, and that during such reading all pleas should cease.

By the statute, 4 Hen. 7. c. 24. § 1. it is enacted, "That after ingrossing of every fine, it shall be read and proclaimed in open court the same term, and in three terms then next following the same ingrossing, in the same court, at four several days in each term; and in the same time that it is so read, all pleas to cease."

Since the making of this act, the proclamations are indorsed on the foot of the fine, and are considered as matters of record.

By the words of the statute 4 Hen. 7. if one of the three terms immediately subsequent to that in which a fine was levied, was adjourned, the proclamations would have been ineffectual, and this defect could not have been supplied in the next term: no remedy which a statute was passed 1 Mary. § 2. c. 7. enacting, "That all fines, whereupon the proclamations should not, by reason of the adjournment of any term, by writ, be duly made, should be, of as good force, effect and strength, to all intents and purposes, as if the term had not been adjourned."

It has been determined by all the judges that even an adjournment of part of a term was provided for by this act, because it was a favourable law, and to be construed by equity.

By the 31 Eliz. c. 2. It is enacted, That all fines shall be proclaimed only four times, that is to say, once in the term wherein they are ingrossed, and once in every of the three terms holden next after the same ingrossing; and that every fine proclaimed as aforesaid, shall be of as great force and effect in law to all intents and purposes, as if the same had been sixteen times proclaimed.

Since the statute 4 Hen. 7. Fines have been distinguished into fines at common law, and fines with proclamations: and it is in the election of every person who levies a fine to have it proclaimed in the usual manner or not.

And if the cognizee dies before the proclamations are made, his heirs may cause the fine to be proclaimed.

The statute directs that the proclamations should be made not only during term, but also in court at the time when the judges are sitting: so that if the proclamations happen to be made either before the beginning

or

Plowd. 371.

Dyer 186.

2 Inst. 519.

3 Rep. 86. b.

Wakefield v.

Hodgeson,

Cro. Eliz.

662.

Dyer 254. a.

Fish v. Broc-

ket, Plowd.

265.

Dyer 181, b.

or after the end of term, or on a Sunday, or other festival day on which the court does not sit, being *dies non juridicus*, the proclamations will be all void. And although the proclamations should be made on days which were *dies juridici*; yet if the contrary appears on record, the proclamations are void, as no averment can be admitted against the record.

Dyer 216. a.
1 Eulst. 206.

An error in the proclamations would not however destroy the validity of the fine, for it would still enure as a fine at common law; because the fine taken separately is one perfect matter of record before the proclamations are made, which binds the parties and the right of the land, and the proclamations are distinct and different from the fine, they and the fine being several matters of record, for which reason error in the one is not error in the other. But if the fine is erroneous the proclamations are then void, because the fine is the principal, and *sublato subjecto tollitur ejus accedens*.

Ragg and
Bowley's case.
3 Leo. 106.

If the proclamations on a fine be certified in a *certiorari* by the *custos brevium*, and it appears by the certificate that two of the proclamations were made in one day, a new *certiorari* may be directed to the chirographer, and if he certifies that the proclamations were well and duly made, the court will direct the proclamations in the office of the *Custos Brevium* to be amended, according to the proclamations in the Chirographer's Office, because the Chirographer makes the proclamations, and is the principal officer as to them, and the *Custos Brevium* has only an abstract of them.

Gilb. Evid.
25.
Buller N. P.
229.

When a fine with proclamations is given in evidence the proclamations must be examined by the roll, because the chirographer is not appointed by the statute to copy the proclamations, as he is to copy the concord.

By the 23 *Eliz. c. 3. s. 6.* It is enacted, That the chirographer shall every term, write out a table of the fines levied in each county in that term, and shall affix it in some open part of the court of Common Pleas all the next term; and shall also deliver the contents of each table to the sheriff of each county, who shall at the next assizes fix the same in some open place of the court.

It was formerly a practice for one person to acknowledge a fine in the name of another, and in such cases the court of Star Chamber, within whose jurisdiction frauds

frauds of this kind were considered, could only punish the offender by imprisonment. But by the statute 21 Jac. I. c. 26. It is enacted, That all and every person and persons who shall acknowledge any fine in the name of any other person, not privy or consenting to the same, and shall be lawfully convicted thereof, shall suffer death without benefit of clergy.

CHAPTER III.

At what Time a Fine is completed, and when it begins to operate.

A fine is completed on the entry of the king's silver. *2 Inst. 517.* SIR Edward Coke in his comment on the statute *de modo levandi fines*, says—"a fine is said to be levied when the writ of covenant is returned, and the concord and the king's silver duly entered; this maketh

"the land to pass, and from this shall the year and day be accounted, albeit the fine be ingrossed afterwards."

The modern method of levying a fine by first acknowledging the concord, then suing out an original writ, and paying the king's silver, has given rise to a different mode of expressing the rule laid down by Sir Edward Coke; for a fine is now said to be completed upon the entry of the king's silver, and if any of the cognizors die before the remaining parts of the fine are perfected, still the fine will be valid.

This principle has so far prevailed, that the court will not prevent a fine from being completed after the king's silver is paid, if the parties are alive.

Petty's case.
1 Freem. 78.

Thus where a motion was made to stay the passing of a fine which was acknowledged by an infant of thirteen years old, the court said as the king's silver was paid it was gone too far. But they assigned the infant a guardian who had instructions to bring a writ of error to reverse it.

As the king's silver is not payable until the return day of the writ of covenant, it follows that if any of the parties die before that time the fine will be void.

Wright v.
Mayor of
Wickham.
Cro. Eliz.
484.
Okell v.
Hodgkinson,
3 Mod. 99.
S. P.
Clements v.
Langharne.
2 Ld. Raym.
872.

Thus where a writ of error was brought to reverse a fine levied by husband and wife, and the error assigned was that the writ of covenant upon which the fine was levied, bore teste the 10 August, 12 Eliz. and was returnable termino Michaelis eodem anno, which was the 27 October, the fine was acknowledged before commissioners, and the wife died the 17th October, which was before the return of the writ of covenant. The fine was reversed.

So where a writ of error was brought by the heir of the wife of the cognizor, to reverse a fine levied in Wales by husband

husband and wife, the lands being the estate of the wife, and the error assigned was, that the wife died before the return of the writ of covenant. The fine was reversed without any difficulty.

In the same manner, where an application was made to the court of Common Pleas to vacate a fine, and it appearing that the writ of covenant was sued out and returnable, after the death of one of the cognizors, the court after hearing counsel in support of the fine, and against it, said, they would not in so plain a case put the parties to the trouble and expence of a writ of error, but vacated it; for the concord or agreement is to be made at the return of the writ of covenant, and if the party dies before that day there can be no agreement, but all must be void.

It follows from these cases, that where the death of the cognizor before the payment of the king's silver can be proved without contradicting the record, the fine is erroneous, and may be set aside. But in consequence of the principle laid down in p. 38. if it appears upon the record that the king's silver was paid before the death of the cognizor, though in truth the fact be otherwise, the judges will support such a fine, and will not allow of any averment that the cognizor died before the entry of the king's silver, because that would contradict the record.

Thus where a man and his wife acknowledged a fine before commissioners on the 26th of *March* 1621, the wife died the 27th, and on the 28th composition was made in the Alienation Office, upon a writ of covenant which was returnable the preceding *Hilary* term, and the king's silver was entered as of the same *Hilary* term, and so the fine was passed and ingrossed; the heir at law of the wife moved to have the fine set aside, but upon debate, the court resolved the fine should stand.

So where a fine was acknowledged by a man and his wife on the 27th *December*, 1689, but by reason of King *James's* abdication, and his carrying away the great seal there followed a stay of proceedings at law, and the woman died on the 22d of *February*. The king's silver was paid as upon a writ of covenant in King *James's* time, tho' no writ was then sued out. Afterwards a writ of covenant was purchased, returnable in the *Michaelmas* term preceding, sealed with the seal of King *William* and Queen

Cookman v. Farrer.
Sir T. Raym.
461. S. P.
Price v. Davis,
Comb. 57. 71,
S. P.
Watts v. Birket,
Barnes 220.
2 Wilson 115.

Farmer's case,
Hob. 330.

Roll. Ab.
Fine Q. p. 1.
Dyer 220. b.
S. P.

Anonymous,
2 Vent. 47.

Queen *Mary*, and the fine was ingrossed as of *Michaelmas* term. It was moved that this fine should be vacated, but the court, after the cause had been twice argued, gave their opinion *seriatim* that the fine should stand, as the entering of the king's silver, after the death of the parties could not then be examined into, the fine being ingrossed and completed as a fine of *Michaelmas* term.

Harneis v.
Micklethwaite,
Barnes 214.

A fine was stopped at the king's silver office by a *caveat* entered by order of a judge, upon an affidavit of the death of a married woman who was one of the cognizors, and an application was made to the court, that the fine might pass, notwithstanding such *caveat*.

It appeared that the married woman died the day after the caption of the fine, and after the *teste* but before the return of the writ of covenant. It was insisted, that as the king's silver was not paid before the death of the wife, the fine ought not to pass. On the other side it was contended, that fines were common assurances; that the acknowledgment made the fine complete; that the king's silver was the fine *pro licentia alienandi*, which was the pre-fine paid at the Alienation Office, and for which a receipt was indorsed on the writ of covenant, and that it was no part of the post-fine, which was never collected until the fine was completed. The court after consideration were of that opinion, and ordered the fine to pass.

The doctrine laid down in this case, that the king's silver is the pre-fine, or fine paid *pro licentia alienandi*, is certainly wrong, and has been contradicted by the following determination:

28 Geo. I.
Barber v.
Nunn,
Barnes 218.

A fine was acknowledged before commissioners on the 13th of *May*, 1754. The writ of covenant was tested the first day of *Easter* term 1754, returnable from the day of *Easter* in five weeks (19 *May*). It was compounded and the pre-fines paid between the 17th and 20th of *May*, and after passing the return, warrant of attorney, and *Custos Brevium* Office, was brought to the King's Silver Office, on the 11th of *June*, and the clerk then entered the king's silver, or post-fine in his book, and on the writ of covenant. *Mary Nun*, the cognizor, died on the 27th of *May*. A *caveat* to prevent the completing of this fine was brought to the King's Silver Office the 13th of *June*, before the record was made up in form, on behalf of *John Nun*, eldest son and heir of the cognizor. A rule to

to shew cause why that *caveat* should not be withdrawn was made absolute, and the court utterly exploded the notion which prevailed; undoubtedly by mistake, in the case of *Harneis v. Miceletwaite*, that the king's silver was the pre-fine, or fine for licence to alienate; whereas the king's silver is the post-fine, or fine given *pro licentia concordandi*. The return of the writ of covenant was agreed to have been in the life time of *Mary Nun*, the cognizor; and from that time the crown had a right to the post-fine, which was entered at the King's Silver Office, before any *caveat* was entered against it: the making up the record in form, is a ministerial act, not necessary to be done previous to the *caveat*, as the entry of the clerk of the king's silver was sufficient.

Although it must be very material in many instances to fix the precise time when a fine begins to operate, yet it is a subject respecting which very little is to be found in the writers on law; but if we reason by analogy from the nature and effects of other judgments we shall be able to ascertain this point.

When a fine begins to operate.

The time when a fine is acknowledged is perfectly immaterial in this respect, for we have already seen an instance where it was determined, that a fine began to operate in *Michaelmas* term, although it was not acknowledged until four months afterwards.

Ante p. 21.

The term in law is considered to many purposes as but one day, and if a judgment be given at any time during the term, it relates to the first day of that term, and is considered in law as having been given on that day; and the first day of term is the escoin day, for the *quarto die post* is only a day of grace. However if a writ is returnable on the second or any other return day of the term, the judgment will then relate to that return day; for until the return of the writ, the judgment cannot possibly be given.

Cro. Car.

102.

1 Bulst. 32.

35.

Yelverton 35.

A fine being considered as a judgment, must, like all other judgments, relate to the first day of term in which it is recorded, if the writ of covenant whereon it is levied be returnable the first day of term, otherwise it must relate to the return day of the writ of covenant; for, in levying a fine, there is no continuance of process to retard the relation, as the *licentia concordandi* is supposed to be obtained on the return of the writ of covenant, and the concord immediately acknowledged.

Cro. Car.

102.

1 Bulst. 32.

35.

In

In support of this proposition I shall transcribe a case reported by *Jenkins*, of which I presume the authority will not be disputed, although the reporter has not mentioned when or by what court it was determined.

Jenk. 250.

"*A.* covenants with *B.* to levy a fine *Oct. Michaelis*,
" *1 Car. 1.* *A.* acknowledges a statute to *C.* 8th *October*
" same year. The fine is levied according to the cove-
" nant, and the consue taken the 12th *October* afore-
" said. This consuee shall avoid said statute by relation
" to the day of the escoin, which was before the said 8th
" day of *October*."

Vol. 3. p.
170.

In a note of Mr. *Peere Williams*, it is said, that if *A.* devises land, and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption; and yet (says the reporter) this is a hard case, since by the caption the party conuzor does all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

Vide Roll.

Abr. Fine

(Q.) No. 11.

2 Burr. 711.

These passages, and the conclusions drawn from the rules by which all other judgments are construed, seem fully to prove, that a fine, whether it be acknowledged before or after the original writ, on which it is levied is sued out, will begin to operate from the return day of such original writ.

CHAPTER IV.

Of the several Sorts of Fines.

WHENEVER a judgment is obtained, whether in an adversary or an amicable suit, the next step is to procure the execution of it by obtaining the actual possession of the thing recovered: and for this purpose the law has provided, that in all real actions, the person who recovers, shall have a writ of *habere facias seisinam*, directed to the sheriff of the county in which the lands are situated, commanding him to deliver the possession according to the judgment. *Fines executed, and executory.*

Fines having been at all times considered as judgments in adversary suits, a writ of *habere facias seisinam* always issued to put the party in possession who acquired the lands by a fine. When fines became common assurances, the purchaser in order to avoid the trouble and expence of suing out a writ of possession, had in some instances livery of seisin given him in the country, and for his farther assurance, obliged the vendor to covenant that he would levy a fine to him; but as the purchaser was already in possession, no writ of *habere facias seisinam* was deemed necessary. *Ante p. 3. 2 Bac. Ab. 524.*

This practice gave rise to the distinction between fines executed and executory. A fine executed immediately transfers the possession from the cognizor to the cognizee, who may therefore enter on the lands which have been conveyed to him by the fine, as soon as it is levied. *Co. Read. 2.*

A fine executory does not, of its own force, give immediate possession in law to the cognizee, as he cannot immediately enter on the lands: but it is necessary that he should sue out a writ of *habeas facias seisinam*, in order to gain possession of that which he has acquired by the fine.

The cognizee of a fine cannot distrain before entry, because an avowry comes in lieu of an action, to which privity is requisite; for the same reason he cannot have an action of waste, a writ of entry *ad communem legem in consimili* *1 Inst. 320. 2. Shep. Tou. 253.*

Gilb. Ten.
102.

consimili casu, or in *casu proviso*. But the cognizee may take those things which the lord might seize or enter upon, without bringing any action, as a heriot, lands fallen by escheat, or may enter for an alienation of a tenant for life.

2 Inst. 469.
1 Reeves
426.

Where the cognizee of a fine executory has suffered a year and a day to elapse from the time when the fine was levied, without suing out a writ of *habere facias seisinam*, he must then sue out a writ of *scire facias*, which may also be sued out by the heir of the cognizee.

By this writ the sheriff is commanded to warn the terre-tenants to appear and shew cause, if they can, why the cognizee of the fine or his heirs should not have execution of the fine. And if at the return of the *scire facias* the terre-tenants do not shew some cause to the contrary, the plaintiff or cognizee becomes intitled of course to a writ of *habere facias seisinam*.

Shep. Touch.
4.

If the party to whom the estate is limited by a fine executory be in possession at the time when such a fine is levied, he need not sue out a writ of *habere facias seisinam*; for in that case the fine will enure by way of extinguishment.

1 Rep. 97. a.

If a fine executory be levied of a reversion depending on an estate for life, or years, or of a seignory, or any thing which lies in grant, they will pass immediately, because it would be impossible to give actual possession of them.

Booth 250.

Pigot 49.

6 Rep. 68. a.

Since the statute of Uses 27 Hen. 8. writs of possession are never sued out where fines are levied to uses, for the statute executing the possession to the use, the cognizee is immediately in possession without attornment; and now, by the 4. and 5 Ann. c. 16. attornment after a fine is become unnecessary.

Fines are again divided into four sorts. 1. *Fines sur cognizance de droit come ceo*. 2. *Fines sur cognizance de droit tantum*. 3. *Fines sur concessit*. 4. *Fines sur done grant & render*.

Fines sur cognizance de droit come ceo, &c.

A fine *sur cognizance de droit come ceo qu'il a de son done* is the best and surest kind of fine; for the desorciant, in order to keep his supposed covenant with the plaintiff, of conveying him the lands in question, and at the same time to avoid the formality of an actual feoffment, with livery of seisin, acknowledges in court a former feoffment

ment or gift in possession, to have been made by him to the plaintiff; so that it is rather an acknowledgment of a former conveyance than a conveyance originally made; for the deforciant acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself the cognizor.

This species of fine has been called a feoffment of record; but this expression is by no means accurate; for there are cases in which a feoffment has a more extensive operation than a fine; and therefore Sir *William Blackstone* has justly observed, that it might, with more accuracy, be called an acknowledgment of a feoffment on record.

1 Inst. 50. b.
1 Salk. 339.
3 Atk. 141.
2 Comm. 348.

The form of this fine is: "And the agreement is such, to wit, that the aforesaid *A. B.* hath acknowledged the aforesaid manor, &c. to be the right of him the said *C.* as that which the said *C.* hath of the gift of the aforesaid *A.* and that he hath remised and quit-claimed from him the said *A.* and his heirs to the aforesaid *C.* and his heirs for ever."

This species of fine is executed, and therefore gives Co. Read. 2. the cognizee immediate possession of the land.

It also passes an estate in fee simple without the word heirs; for when the cognizor acknowledges the lands to be the right of the cognizee, it would be repugnant and contradictory to his own acknowledgment to claim any estate in the lands in remainder or reversion. Besides, in every judgment a fee simple was recovered, and the cognizance or acknowledgment of the concord coming in the place of a judgment, must have the same effect.

1 Inst. 9. b.

But if the concord is qualified by the express words of the parties, as if the lands are limited to the cognizee for life, or to the cognizee and the heirs of his body, the fine will then only pass an estate for life, or an estate in tail; for it would be absurd that a greater estate should pass than that which the parties themselves have limited; and the preceding donation or feoffment which is acknowledged in the fine, may as well be supposed to have been for life, or in tail, as in fee.

1 Salk. 340.

A rent cannot be reserved on a fine *sur cognizance de Bro. Abr. droit come ceo*, or on any other fine which is executed; Tit. Fine, p.

D

because, 30.

because, as the cognizance supposes a preceding gift, the cognizor cannot reserve to himself any thing out of lands, whereof he has already conveyed away the absolute property; so that the *reddendum* comes too late, when a precedent absolute gift without any such reservation is before acknowledged.

Roll. Abr.
Tit. Fine,
(O) n. 10.

But if an estate for life only be conveyed by the fine, the cognizor may then reserve a rent with a clause of distress; because, not having acknowledged the entire and absolute property to be in the cognizee, it is not repugnant to reserve a rent out of it.

Fines sur cognizance de droit tantum,
2 Comm. 353.

Fines sur cognizance de droit tantum, or upon acknowledgment of the right only, without the circumstance of a preceding gift by the cognizor. This species of fine is generally used to pass a reversionary interest, which is in the cognizor; for of such reversions there can be no feoffment or donation with livery supposed, as the freehold and possession during the particular estate is vested in a third person.

Co. Read. 3. This fine may also be used by a tenant for life, in order to make a surrender of his life estate to the person in remainder or reversion; and it is then called a fine upon surrender.

The form of it is: "And the agreement is such, to wit, that the aforesaid *A.* hath acknowledged the aforesaid tenements, &c. to be the right of the said *B.* and he hath granted, for himself and his heirs, that the aforesaid tenements which *W. R.* and *M.* his wife hold for the term of the life of the said *G.* of the inheritance of the said *A.* on the day on which this agreement was made, and which, after the decease of him the said *G.* ought to revert to the said *A.* and his heirs, shall, after the decease of the said *G.* entirely remain to the said *B.* and his heirs for ever."

1 Inst. 9. b.
2 Bac. Abr.
524.

This fine is executory, and passes a fee simple without the word heirs. It seems to have been the most antient species of fine; for the demandant was obliged to follow the rules of law, and sue out a writ of possession: but when it became usual to procure a feoffment of the lands first, a writ of possession became unnecessary, which probably gave rise to *fines sur cognizance de droit come ceo*.

Co. Read. 3.

If there be a tenant for life, remainder for life, and the first tenant for life levies a fine to the person in remainder

mainder *sur cognizance de droit tantum*, it will operate merely as a surrender of his estate for life; because, by this fine, the tenant for life only acknowledges all the right which he has in the lands to belong to the person in remainder. But if in this case the tenant for life had levied a fine *sur cognizance de droit come ceo, &c.* it would create a forfeiture of both their estates, and the person in reversion might enter immediately; because a fine *sur cognizance de droit come ceo, &c.* is always supposed to pass an estate in fee simple, unless the contrary is expressly mentioned; whereas a fine *sur cognizance de droit tantum* only conveys all the right which the cognizor has, and no more. Vide infra ch. 14.

A fine *sur concessit* is where the cognizor, in order to make an end of disputes, though he acknowledges no pre- cedent right or gift, grants to the cognizee an estate *de novo*, by way of supposed composition, which may be ei- Fine sur con-
cessit,
2 Comm. 353.

The form of this fine is: "And the agreement is such, to wit, that the aforesaid *A.* hath granted to the aforesaid *B.* the aforesaid tenements, &c. to hold for sixty-one years." It is executory, and therefore the cognizee must sue out a writ of possession. Can Prodomate
-ons be had on
this fine -

A fine *sur done grant & render* is a double fine, com- prehending the fine *sur cognizance de droit come ceo*, and the fine *sur concessit*. It is used in order to create particu- lar limitations of estates; whereas the fine *sur cogni- zance de droit come ceo* conveys nothing but an absolute estate, either of inheritance, or at least of freehold. Fine sur done
grant et ren-
der, 2 Comm.
353.

In this fine, the cognizee, after the right is acknowledged to be in him, renders or grants back to the cognizor some other estate in the lands.

The form of this fine is: "And the agreement is such, (to wit) that the aforesaid *A.* hath acknowledged the aforesaid tenements to be the right of him the said *B.* as those which the said *B.* hath of the gift of the aforesaid *A.* and those he hath remised and quit-claimed from himself the said *A.* and his heirs for ever, (warranty from the cognizor:) and, for this acknowledgment, remise, quit-claim, warranty, fine and agreement, the said *B.* hath granted to the said *A.* the aforesaid tenements, &c. and this he hath rendered to him, in the same court to hold the said tenements, &c. to the said *A.* and the heirs of his body."

Co. Read. 11. In a fine of this sort the render must be made of the
2 Roll. Abr. lands demanded in the original writ, or of something if-
15, 16. suing out of those lands. Thus if the cognizance be
made of the manor of *Dale*, the cognizee cannot make a
render of the manor of *Sale*; or if the cognizance be made
of the third part of a manor, the render cannot be of the
whole manor, because the court can only determine the
right of that about which the parties contended, and
which was demanded in the original writ: but if the
cognizor acknowledges all his right in the lands to be in
the cognizee, and the cognizee in return grants and ren-
ders to the cognizor a particular estate in the land, or a
rent or common out of it, the render is good, because the
determination entirely refers to the things in dispute, one
party taking the ultimate property of the land, and the
other a particular estate in it; all which is comprehend-
ed in the original writ.

Co. Read. 6. It follows from the same principle, that the lands must
be rendered in the first instance to some person named in
Ante p. 28. the original writ: but an estate may be rendered to a per-
son not named in the original writ, by way of remainder,
as well as in any other kind of concord.

Co. Read. 6. A fine *sur done grant & render* is executed as to the first
part, and executory as to the second; for, if the first
part was not executed, it would be void; as the cognizee
can have nothing to render to the cognizor until he is in
possession.

Shep. Touch. This species of fine being generally used to create par-
18. ticular limitations of estates, is construed rather as a pri-
vate deed or conveyance than as a judgment in an ad-
versary suit; and therefore it need not have such a pre-
cise form as other fines.

Tey's case, Thus, where husband and wife levied a fine to *A.* and
5 Rep. 38. *B.* and the heirs of *A.* of the manor of *Layer de la Hay*,
Layer Britton, and of several other manors, and a great
number of acres of land, meadow, pasture, &c. in *Layer*
de la Hay, *Layer Britton*, &c. and in this fine several
grants and renders were made. In the third render the
manors of *Layer de la Hay*, and *Layer Britton*, et tene-
menta prædicta in *Layer de la Hay*, and *Layer Britton*,
were granted and rendered to the husband and wife, and
to the heirs of the husband; and by the fourth render
115 acres of land in *Layer Britton* were granted, and ren-
dered to the wife in tail.

After

After the death of the husband, his brother and heir brought a writ of error, and assigned for error the repugnancy between the third and fourth render; for, by the third render, all the lands in *Laver Britton* were granted to the husband and wife, and to the heirs of the husband; and, by the fourth render, part of the same tenements were granted to the wife in tail; so that the same lands were granted to two different persons, which was repugnant and erroneous. It was observed, that a fine was of the same nature as a judgment, and as *Bracton* says, *Oportet ut res certa deducatur in iudicium*. But the court resolved, that the fourth render, as to that which was contained in the third render, should be of the same condition and quality in construction, as a charter or other conveyance between party and party, and need not have such a precise form as a writ or judgment; and therefore, that the fourth render was good, and should invalidate the third render as to the 115 acres.

If lands be rendered by fine to a person and his heirs, 1 Rep. 156. a. the lands are thereby immediately bound; and although the person to whom the render is made dies before execution, yet his heirs will have the lands; for the fine having been levied in the lifetime of the parties, the lands were so bound by it, that it could not be altered.

In a fine *sur done grant & render*, the cognizee is but an instrument, who has a seisin only for an instant, which is not sufficient to intitle his wife to dower; however this fine operates as a feoffment, and re-enseffment, and gives a new estate: so that if a person, seised of an estate, *ex parte materna*, levies a fine *sur done grant & render*, and takes back an estate to himself and his heirs, the nature of the descent is thereby altered, and the estate will thenceforth descend to his heirs *ex parte paterna*. *A fine sur done grant and render gives a new estate.* 1 Inst. 31. b.

Thus where *J. S.* was seised of lands *ex parte materna*, Price v. Langford, 1 Show. and he and his wife levied a fine to *J. N.* and *J. D.* and they by the same fine granted and rendered the same lands to the use of the said *J. S.* and his wife, and the heirs of their two bodies, remainder to the right heirs of *J. S.* The husband and wife died without issue, and the question was, whether this remainder descended to the heirs of the part of the mother, or of the part of the father. *Rep. 92. Salk. 337. Carthew 140. Rep. Temp. Holt. 253.*

It

It was argued on the one side, that this seisin of the cognizee was merely fictitious : for if the cognizee had a term for years in the land, it would not be merged : that it was like the case of the surrender of a copyhold into the hands of the Lord, who was thereby only a mere instrument ; therefore that nothing was altered by the fine, but the estate remained as before.

On the other side it was contended, that the cognizee could not render the estate, unless he had it in him, and that the grant and render operated as a feoffment and re-enfeoffment.

The court held that the estate was once in the cognizee, otherwise he could not give it back : that the grant and render was a conveyance at common law, and made the cognizor a new purchaser, as much as a feoffment and re-enfeoffment ; so that the remainder descended to the heirs on the part of the father.

It is observable, that this is the only sort of fine which gives a new estate ; for if a person, seised *ex parte materna*, levies a fine *sur cognizance de droit come ceo*, and either makes no declaration of the uses of it, or declares it to be to the uses of himself and his heirs, the lands will still descend *ex parte materna*, because it is still the old use, which, consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have descended if no alteration had been made ; and it is totally immaterial whether the use be expressly declared upon a fine, or permitted to arise by implication.

Do,
1 Salk. 590.

2 P. Wms 139.

2 Will. 19.

CHAPTER V.

In what Courts, and before whom, a Fine may be levied.

A Fine being a composition of a suit commenced for the recovery of real property, it might originally have been levied in any court which had jurisdiction to hold pleas of land: and accordingly it appears, that, in the early ages of the law, when courts were more numerous, and their jurisdiction more extensive than at present, fines were frequently levied in the Lord's Court, the Hundred Court, and the County Court; and in *Dugdale's Origines Juridicales* 92. there is a record of a fine which was levied in the county court of *Nottingham* in the reign of king *John*.

Fines were also levied in all the courts at *Westminster*, and even before the king himself, as appears from a great number of records which have been published in *Spelman's Glossary*, and by *Dugdale* and *Maddox*.

* From the time of the appointment of justices in *Eyre* by *Hen. 2.* fines were usually levied before them, on account of the pre-eminence of their court, over the county courts; and *Maddox* has preserved several concords of fines which are expressed to have been levied, *coram abbas de Evesham Johanne de Munmul, &c. justiciariis itinerantibus*.

In consequence of the fixed residence of the court of Common Pleas at *Westminster* by *magna charta*, fines were thenceforth usually levied in that court, because therein only could real actions be commenced; however if a record was removed by writ of error from the court of Common Pleas into the court of King's Bench, a composition of the suit might take place there, by which means a fine might be levied in that court.

It is enacted by the statute *de modo levandi fines*, that fines shall be levied in the court of Common Pleas, or before justices in *Eyre*, and not elsewhere, and that a fine shall not be levied unless all the justices are present. But Sir *Edward Coke* says, that the latter part of this statute

was

* Glanv. l. 2. c. 5.

Gilb. Ten.

100.

Hale's hist.

151.

Vide 3 Rep.

Preface.

Dugd. Orig.

Jur. 50. 92.

Maddox,

Form. Ang.

No. 364.

4 Inst. 75.

Maddox

Exch. 145.

No. 365, 366.

367, 369.

372. Roll.

Abr. Tit.

Fine (C).

Court of Com-

mon Pleas.

4 Inst. 99.

Dentshall

Read. on

fines 3.

2 Inst. 515.

Co. Read. 8.

was repealed by implication by the stat. 4 Hen. 7. so that now a fine levied in the court of Common Pleas before two justices is considered to be equally valid, as if all the judges were present.

2 Inst. 514.
Co. Read. 8.

An opinion is advanced by Sir Edward Coke, that a fine cannot now be levied so as to have the force of a final concord in any court but the Common Pleas; and therefore that the king cannot now, in contradiction to this negative statute, grant a power to hold pleas for the purpose of levying fines. He seems also to have been of opinion, that since this statute, fines cannot be levied in any inferior court, unless the privilege of holding such court has been confirmed by act of parliament; but this is certainly a mistake, for fines may still be levied in inferior courts, as will be shewn in a subsequent part of this chapter.

Lord Chief
Justice of
the Common
Pleas.

1 Hen. 7. 9. a.

2 Inst. 512.

Co. Read. 9.

Crom. Jurisd.

92. 2.

Dyer 224. b.

Year Book 8.

Hen. 6. 21.

Dyer 220. b.

Of the writ
of dedimus po-
testatem,

1 Reeves 154.

The Lord Chief Justice of the court of Common Pleas may alone take the acknowledgment of a fine out of court, a privilege peculiar to that office, and which seems to be derived from custom and usage, for it does not appear that this power is given to the Lord Chief Justice by any statute—*Capitalis iusticiarius de banco solus per prærogativam officii sui potest capere recognitiones finium, absque dedimus potestatem.*

If the Lord Chief Justice of the court of Common Pleas be a party to the writ, he cannot take the acknowledgment of that fine, *quia iudex in propria causa.* This rule extends to all other judges and commissioners.

It appears from Glanville, lib. 11. c. 1. that the suitors in the *curia regis* were at all times allowed to prosecute their causes by attorney, who was called *responsalis ad lucrandum vel perdendum*; and a plea might be thus commenced and determined, whether by judgment, or by final concord, as effectually as by the principal himself. *Per procuratorem itaque talem potest placitum illud deduci in curia et terminari, sive per iudicium, sive finalem concordiam, adeo plene et firmiter ut per eum qui alium loco suo inde posuit.*

In consequence of this rule fines were frequently levied by attorney, and in the *Formulare Anglicanum* there are several records of fines which appear to have been levied by attorney, the chirograph being worded in this manner—*Hæc est finalis concordia facta, &c. inter Thomam de Preston*

No. 369.
256.

Preston per Alexandrum Wallensem, positum loco suo ad lucrandum vel perdendum et Radulphum, &c. This practice was productive of several frauds (a); and therefore the statute *de modo levandi fines* enacted, that the parties to a fine should appear personally in court, that the judges might have an opportunity of examining into their age and capacity.

The great inconvenience of compelling old and infirm persons to travel from the most remote parts of the kingdom to *Westminster*, produced a regulation, which is usually called the statute of *Carlisle*, but which in fact, is a writ addressed by *Edward 2.* to the judges for their government in taking the acknowledgment of fines. It ordains, that all parties who would acknowledge or render their rights or tenements to another by fine, should appear personally before the justices, so that their age, idiocy, or any other defect might be judged of by them. ^{15 Ed. 2.} ^{2 Reeves 15.} ^{2 Inst. 512.}

“ Provided notwithstanding, that if any person be by
 “ age or impotence decrepit, or by casualty so oppressed
 “ and withholden, that by no means he is able to come
 “ before you in our court, then in such case we will that
 “ two or one of you by assent of the residue of the bench
 “ shall go unto the party so diseased, and shall receive
 “ his cognizance upon that plea and form of plea that
 “ he hath in our court, whereupon the same fine ought
 “ to be levied: and if there go but one he shall take
 “ with him an abbot, a prior, or a knight, a man of
 “ good fame and credit, and shall certify you thereof by
 “ the record, so that all things incident to the same fine
 “ being examined by him or them, the same fines according to our former ordinance may be lawfully levied.”

(a) There is an instance in the Rolls of Parliament 18 Ed. 1. No. 9. vol. 1. p. 22. where a person complains, that having demised certain lands to another, for twelve years, and agreed to levy a fine, to confirm the demise he appointed a friend of the lessee's as his attorney for that purpose, who acknowledged a fine of other lands to the lessee and his heirs for ever, *et idem Mattheus postea tulisset quoddam breve de conventionione versus ipsum Willelmum de prædicto termino affirmando, prout idem Mattheus fecit ipsum Willelmum quendam attornatum facere, ad finem illum levandum coram justiciariis de Banco; prædictus Mattheus tamen fecit et procuravit erga attornatum illum qui fuit de notitia et amicitia sua, quod idem attornatus recognovit alia tenementa quæ fuerunt ipsius Willelmi, et in scripto inter eos confectio non contenta, &c.*

In

In consequence of this regulation, a special commission issues out of the court of Chancery, called a writ of *dedimus potestatem* directed to a certain number of commissioners, reciting that a writ of covenant is depending before the justices of the court of Common Pleas, between certain persons therein named, who are incapable from infirmity of appearing personally before the court, and authorising the commissioners to take the acknowledgment of the said parties concerning the matters contained in the writ, and directing them to certify such acknowledgment under their hands and seals to the court of Common Pleas.

Earl of Bedford v. Foster,
1 Roll. Abr.
794.

The commissioners in a writ of *dedimus potestatem* made their return in these words: *executio istius commissionis patet in quodam pannello huic commissioni annexo*, where it ought to be *in quodam schedula*, and it was resolved not to be erroneous, for it would have been sufficient if they had returned—*executio patet in hac annex.* or even if they had returned the concord under their hands and seals, without any words.

Although this writ still appears to be granted upon a suggestion of infirmity in the parties, yet such suggestion is seldom true, the writ being usually obtained to save the expence or inconvenience of a journey to *Westminster*, or for the purpose of levying a fine in vacation time.

Bro. Ab. Tit.
Fine 120.
Co. Read. 9.
2 Vent. 30.

Wilson 78.

The statute of *Carlisle* only gives authority to two of the justices, or to one of them attended by an abbot or knight, to take the acknowledgment of fines; but notwithstanding this restriction, writs of *dedimus potestatem* were frequently directed to persons of inferior quality, from whence many abuses arose, which gave rise to a rule of court, *Pasch. 43 Eliz.* by which it was ordered that no writ of *dedimus potestatem* directed to commissioners, to take the acknowledgment of any fine should be received or recorded, unless the acknowledgment was taken by some of the justices of the one bench or other, or barons of the Exchequer, or serjeant at law, or knight who was of the *quorum*.—Custom has however so far prevailed against the positive authority both of the statute, and of this rule, that although a knight is always named in a writ of *dedimus potestatem*, yet he seldom is one of those who take the acknowledgment of a fine.

The

The commissioners appointed by writ of *dedimus potestatem* are directed by the statute 23 *Eliz. c. 23. s. 5.* to certify the acknowledgment of the fine within twelve months after it is taken, and also to certify the year and day whereon the same was acknowledged. *Ante p. 27.*

If the commissioners, in a writ of *dedimus potestatem*, *Fitz. N. B.* refuse to certify the acknowledgment of a fine pursuant to *146.* this statute within twelve months, a *certiorari* may be awarded against them, reciting the substance of the writ of *dedimus potestatem*, and the acknowledgment of the fine, commanding them to certify it; and in case of their refusal, an *alias*, a *pluries*, and an attachment, will issue against them.

If the commissioners die before they have certified the *Idem.* acknowledgment of a fine, their executors must certify it upon a *certiorari*; and, in case of their refusal, the same process lies against them as against the commissioners.

If a writ of *dedimus potestatem* be directed to two persons jointly, and only one of them takes the acknowledgment of the fine, it will be erroneous: *Downes v. Savage, Cro. Eliz. 240.*

If a person has several writs of covenant depending against several persons in different counties, he may have a writ of *dedimus potestatem*, directed to commissioners to take their acknowledgments severally. *Fitz. N. B. 327.*

A writ of *dedimus potestatem* was awarded, to take the acknowledgment of four persons to the same fine. The commissioners returned the acknowledgment of three of the persons only. The court resolved that the fine should pass as against the three persons who had acknowledged it; and that the name of the fourth person should be erased out of the writ of covenant and *dedimus potestatem*. *Anonymous, Cro. Eliz. 576.*

It was resolved in the same case, that if a writ of *dedimus potestatem* be awarded to take the acknowledgment of three persons to the same fine, the commissioners need not take the acknowledgment of all the three persons at the same time, but may take the acknowledgment of one of them at one time, and of another of them at another time.

The writ of *dedimus potestatem* recites, that a writ of Shep. Tou. covenant is depending between the parties, and therefore should bear date after the writ of covenant. *5. Co. Read. 9. 1 Roll. Rep. 223.*

Thus a writ of error was brought to reverse a fine levied at *Chester*, because the teste of the writ of *dedimus potestatem* *Goburn v. Wright,*

Cro. Eliz. 740. *testatem* was prior to the teste of the writ of covenant; and it was held to be a manifest error.

Herbert v. Binion, 1 Roll. Abr. 794. But if the writ of *dedimus potestatem* be tested on the same day with the writ of covenant, the fine will be valid.

Arundel v. Arundel, Cro. Eliz. 677. Thus where a writ of error was brought to reverse a fine, because the writ of *dedimus potestatem* was tested on the same day with the writ of covenant, which was contended to be erroneous, because the writ of *dedimus potestatem* recites, that the writ of covenant is depending; whereas the writ of covenant could not be said to be depending until its return. But the court were of opinion that this was no error, for the writ of covenant may be said to be depending immediately on the purchase of it; and if a stranger should buy the lands before the return of the writ of covenant, it would be champerty.

The judges of assize may, in their circuits, *per consuetudinem regni*, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law places in their judgment and integrity (*b*): in such cases, however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus potestatem* is tested after the date of the acknowledgment, still the fine will be supported.

Argenton v. Westover, Cro. Eliz. 275.

Thus where a writ of error was brought to reverse a fine, and the error assigned was, that it appeared upon record that the acknowledgment of the fine was taken by Chief Baron *Manwood* on the 27th of *March*, and the writ of covenant and *dedimus potestatem* were tested on the 9th of *April*, so that the acknowledgment was taken without any authority; and by the statute 23 *Eliz.* the day of the acknowledgment ought always to be certified; but the court over-ruled this objection, saying it was good enough, and that otherwise they should reverse many fines.

It is the duty of all those who are appointed commissioners in a writ of *dedimus potestatem*, to inform themselves by means of some people of credit, that the persons who acknowledge

(*b*) There is a petition in the rolls of parliament 28 *Edw.* 3. No. 26. vol. 2. p. 261. from the Commons beyond *Trent*, praying that a justice of one or the other bench should come twice each year into their counties to take the acknowledgment of fines.

acknowledge a fine before them are really the parties named in the original writ. They should also be extremely attentive in examining whether there be any married woman, infant, idiot, or lunatick, among the parties to the fine, as they are liable to be severely punished by the court of Common Pleas, for any fraud or wilful neglect in the execution of the trust reposed in them by that court. *Petty's case, Freem. 78.*

By a rule of the court of Common Pleas made in *Hil. 13 Geo. 1.* it was directed, that no fine acknowledged before commissioners should be allowed to pass, unless some person who was present when the fine was acknowledged, should appear personally before the Lord Chief Justice of the court, and be examined upon oath touching the execution thereof. *Rules of Court respecting the taking of Fines by dedimus potestatem. Willson 82, Vide Dean v. Tidmarsh, Barnes 143.*

This rule, having been found by experience to be attended with inconveniencies, and not having answered the good purposes for which it was intended, the court made the following rules :

Hilary 17 Geo. 2. " It is ordered, that instead of an oath made *viva voce* of the due acknowledgment of fines, an affidavit in writing on parchment shall be made and annexed to every fine, in which the person making the same shall swear that he knew the parties acknowledging such fine ; that the same was duly signed and acknowledged, that the party or parties acknowledging, and also the commissioners taking the same, were of full age and competent understanding ; that the feme coverts (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same ; and that the cognizor or cognizors, and every of them, knew the same to be a fine to pass his or their estate or estates, which fine, together with such affidavit annexed, shall be transmitted to the Lord Chief Justice, or some other justice of this court, for his *allocatur* thereon, and such affidavit shall remain annexed to such fine, and be left with the same in the proper office : and it is ordered, that every such affidavit, except where the persons, at the time of their acknowledging the fine, are in *Ireland*, or some other parts beyond the seas, shall be made by some attorney of the courts of *Westminster-Hall*." *Willson 85.*

Hilary

Wilson 89.

Hilary 26, 27 Geo. 2. "It is ordered, that in the affidavits made in pursuance of the preceding rule, the person or persons so making the same shall swear, that the fine was duly signed and acknowledged upon the day and year mentioned in the caption; and if there be any rasure or interlineation in the body or caption of such fine, that such rasure or interlineation was made before the party or parties signed the said fine, and before the caption was signed by the commissioners."

Where fines have been acknowledged out of the kingdom, the judges have remitted the strictness of these rules.

19 *Geo. 2.*
Fleetwood
v. Calenda.
Barnes 219.

Thus the Lord Chief Justice, assisted by Mr. Justice *Clive*, made an order, that a fine should pass as to two of the cognizors, considering the particular circumstances of the case, notwithstanding the same was not signed by them. One of the commissioners attended and made oath, that this fine was duly acknowledged before him, and another commissioner by the cognizors at *Naples in Italy*, that the parties were of full age and good understanding: that the married woman was examined apart from her husband, and freely consented. The fine being taken from persons beyond seas, it was not within the order of the court, requiring an affidavit; and the signing of a fine by the cognizors is not absolutely necessary.

24 *Geo. 2.*
Heathcock v.
Hanbury.
Barnes 217.

Two fines taken at *Hamburg*, where the cognizors resided, were ordered to pass by all the four judges, upon an affidavit by a commissioner, of the due execution of each fine sworn before a clerk in the Chancery of the city of *Hamburg*, and authenticated by his certificate or attestation as a notary publick.

27 & 28
Geo. 2.
Say v. Smith.
Barnes, 217.

A fine was taken before *Prentice*, an attorney, and *Prentice*, a tradesman, as commissioners. *Prentice* the attorney died without making the proper affidavit of the acknowledgment of the fine. One of the cognizors became a bankrupt, absconded, and did not surrender within the forty-two days, as required by the statute. The fine was ordered to pass, on an affidavit of the due acknowledgment of it by *Prentice* the tradesman, notwithstanding the general rule requiring such affidavits to be made by attorneys.

Seton v. Sinclair.
2 Black. Rep.
580.

A fine was taken at *Edinburgh*, and was regular in every respect, except that it was not taken in the presence

sence of an attorney of any of the courts of *Westminster-Hall*, who might have made the usual affidavit of its having been duly taken. An affidavit was made by *Seton* the demandant, that there was no such attorney in or near *Edinburgh*; and the court, on the motion of serjeant *Davy*, who cited *Say v. Smith*, allowed the fine.

By the statute 34, 35 *Hen. 8. c. 26. f. 40.* it is enacted, *Courts of Great Sessions in Wales.* That fines shall and may be taken before the justices of *Wales*, of lands, tenements, and hereditaments, situated within their jurisdiction, by force of their general commission, without any writ of *dedimus potestatem*, to be sued for the same, in like manner and form as is used to be taken before the king's Chief Justice of his Common Pleas in *England*.

And also, *f. 41.* That all fines levied before any of the said justices, with proclamation made the same session, that the said fine shall be ingrossed, and in two other great sessions, then next to be holden within the same country, shall be of the same force and strength, to all purposes, as fines levied with proclamations be of, that be levied before the justices of the Common Pleas in *England*.

By the statute 37 *Hen. 8. c. 19.* it is enacted, *Courts of the County Palatine of Lancaster.* That all fines levied before the justices of the county palatine of *Lancaster*, commonly called justices of assize at *Lancaster*, or before one of them, of any lands, tenements, or other hereditaments, lying, or being within the county palatine of *Lancaster*, which shall be openly read and proclaimed three several days in open sessions, in the presence of the justices of assize at *Lancaster*, or one of them for the time being; and also that shall be openly proclaimed in the same manner at the two next general sessions, that shall be holden in the said county palatine of *Lancaster*, at three several days in either of the said two sessions, after such manner and form as is commonly used in the court of Common Pleas at *Westminster*, shall be of like force, strength and effect in law, to all intents, constructions and purposes, as fines levied in the court of Common Pleas.

By the stat. 2 & 3 *Edw. 6. c. 28.* It is enacted, *Court of the County Palatine of Chester.* That all fines levied or acknowledged before the high justice of the county palatine of *Chester*, or before the deputy or lieutenant justice there, of any lands, tenements, or other hereditaments lying, or being within the said county

ty palatine of *Chester*, which shall be openly read and proclaimed three several days in the open sessions, in the presence of the justice of the said county palatine of *Chester*, or before the deputy or lieutenant justice there at the same sessions, that the same fine shall be engrossed, and also that shall be openly read and proclaimed in the same manner, at the two next general sessions that shall be holden in the said county palatine of *Chester* next after the levying and ingrossing such fine, at three several days, in either of the said two sessions, after such manner and form as is commonly used in the king's court of Common Pleas at *Westminster*, shall be of like force, strength, and effect in law to all intents, constructions, and purposes, as fines duly levied, with proclamations before the king's justices of his Common Pleas.

Court of the
County Palatine of
Durham.

By the stat. 5 *Eliz. c. 27*. It is enacted, That all fines levied before the justice or justices of the county palatine of *Durham*, for the time being, authorised for that purpose, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of *Durham*, which shall be openly read and proclaimed two several days in the open sessions, in the presence of the justices of assize at *Durham*, or one of them at the same sessions, that the same fine shall be ingrossed, and also that shall be openly read and proclaimed in the same manner, at the two next general sessions that shall be holden in the county palatine of *Durham*, next after the levying or ingrossing of such fine, shall be of the same force, strength, and effect in law to all intents and purposes, as fines duly levied, with proclamations before the Queen's Justices of her Common Pleas at *Westminster*.

By the stat. 27 *Eliz. c. 9*. All the clauses in the 23 *Eliz. c. 3*. are extended to fines levied in the courts of great sessions in *Wales*, and also in the courts of the counties palatine of *Lancaster*, *Chester*, and *Durham*.

Court of the
County of the
City of *Chester*.

By the stat. 43 *Eliz. c. 15. f. 3*. It is enacted, That it shall and may be lawful to and for all persons, upon any original writ or writs of covenant, or any other original writ or writs, whereupon fines have been usually levied, to be purchased out of the court of Exchequer within the said county palatine of *Chester*, returnable before the mayor of the said city in the Portmoot Court to be holden within the said city, to levy any fine or fines of
any

any lands, tenements, or hereditaments, lying or being within the said county of the said city of *Chester*, before the mayor of the said city in the said Portmoot Court, in such manner and form as fines may be levied before the high justice of the county palatine of *Chester*; and that the mayor of the said city shall have full power and authority to receive and record all and every such fine and fines, and that all and every such fine or fines which shall be so levied, and which shall be openly read and proclaimed before the mayor of the said city, in the said Portmoot Court once at the same court day that the said fine shall be ingrossed, and once at every of the nine next court days of Portmoot, next after the levying and ingrossing of such fine, shall be of like force, strength, and effect in law, to all intents, constructions, and purposes, as fines duly levied, with proclamations before the said high justice of *Chester*.

And by *f. 5.* of the same statute it is enacted, That upon all such original writs to be purchased out of the said court of Exchequer aforesaid, for the levying of any fine or fines within the said city of *Chester*, the mayor of the said city for the time being, shall have full power and authority to award and send forth such like writ or writs, process, or precepts of *dedimus potestatem* to any two or more sufficient persons, authorising them to receive, and take the acknowledgment of such person or persons as shall be willing to levy such fine or fines, and by reason of sickness, or other reasonable impediment, cannot come in person before the said mayor to make such acknowledgment.

If a fine is found by verdict to have been levied before 1 Will. Rep. the justices of the court of the county palatine of *Lancaster*,^{275.} without finding who those justices were, and whether they had power to take fines or not, the court will presume them to be such justices as had power by statute to take fines in the county palatine of *Lancaster*, if the contrary does not appear.

The tenure of ancient demesne being a species of privileged villenage, the tenants thereof could not sue or be sued for their lands in the king's courts of common law, but had the privilege of having justice administered to them in the court of the manor, by *petit writ of droit close*, directed to the bailiffs of the king's manors, or to the lord of the manor whereof the lands were held.

Courts of Ancient Demesne,
Blackst. Tr.
4to. 218, 231.

In consequence of this principle no fine could be levied by a tenant in antient demesne in the court of Common Pleas; but as such tenants were allowed to commence actions in the court of the manor, they were also permitted to compound their suits, by which means fines have at all times been levied of lands held in antient demesne upon writs of *right close* in the court of the manor.

Hunt v.
Bourne,
Salk. 339.

Thus where it was found by special verdict, that the lands in question were held of the manor of *Wormelow*, which is *de antiquo dominico coronæ domini regis et antecessorum suorum* impleadable in the court of the manor *per parvum breve de recto clauso coram seneschallo sectatoribus et domesmen ejusdem manerii sive eorum locum tenen. et attornat.* And that upon writs of *right-close*, fines had been, time out of mind, levied and leviable in the same court. That *Thomas Guillym* was seised in tail of the said lands, and being so seised 22 Car. 1. a fine was levied in the said court *secundum consuetud. prædictæ* before *A. B. locum tenen. Willielmi Kyrle seneschalli et R. attornat. J. S. et W. attornat. J. N. ad tunc sectator. et domesmen ejusdem curiæ*, by which fine the said *Thomas Guillym concessit tenementa prædictæ* to one *William Nurse*, and *Sarah* his wife, and *John Nurse* their son, for the term of their lives, and the lives and life of the youngest liver of them, under the yearly rent of 6*l.* Then the fine was set forth, and it appeared to have been levied before the attornies of the suitors, *in placito conventionis secundum consuetudinem manerii, come ceo qu'il a de son done.* But this rent was not the antient rent, nor had the lands been usually demised; so that the lease was not warranted by the statute 32 Hen. 8. that *Nurse* entered and enjoyed, and afterwards 24 Car. 1. the said *Thomas Guillym* and his wife levied a fine with warranty, in the said court of Antient Demesne to the use of the husband and his heirs, who bargained and sold the lands to one *Paine* and his heirs, and by another deed released all his right to the said *Paine* and his heirs.

The grantee of the reversion and his descendants, received the reserved rent of 6*l.* until the year 1693, when the last of the three lives dropped; whereupon *Richard Guillym* the grandson of *Thomas Guillym* entered, and the question was whether this entry was lawful or not?

It was determined in the Court of Common Pleas, that the entry of *Richard Guillym* was lawful, and upon a writ

writ of error in the King's Bench the following points were resolved :

First, That tenant in tail of lands held in antient demesne may levy a fine of those lands in the court of Antient Demesne, although it is not a court of record, because it is but agreeable to the power of that court, in other instances ; for they may proceed to try the mise joined in a writ of *right-clofe*, which is of a higher nature Dyer 111. than a fine ; whereas in all other inferior courts on the mise joined the cause must be removed into the Common Pleas by *recordari*, and the statute 18 *Ed. 1.* is but declaratory of the common law, and was made to rectify a Fitz. N. B. 12. mistake, that fines were leviable in inferior courts upon bills or complaints which cannot now be either by grant or custom, by reason of the negative words of that statute. But this does not extend to courts of Antient Demesne, for then the statute 18 *Ed. 1.* would make fines of those lands leviable in the court of Common Pleas, which is not the case, for such fines are reversible by writ of *disseisin*, so that they would be under a double disadvantage, for a fine could not be levied of lands held in antient demesne in any court.

Secondly. That a fine levied in a court of Antient Demesne may work a discontinuance, though the court is not a court of record, for the reason of the discontinuance is, because the freehold is recovered in the action, every recoveror being supposed to recover a fee-simple, and a recovery of the fee-simple must work a discontinuance, so that as this was allowed to be a fine, it must be allowed to have the effect of a fine.

This judgment was affirmed by the House of Lords. 1 Brown 43.

Although fines ought not to be levied in the court of Common Pleas, of lands held in antient demesne, because such lands are not within the jurisdiction of that court ; yet if a fine is levied in the court of Common Pleas, of lands held in antient demesne, it will have the effect of destroying the tenure, and converting them into a frank-fee. 20 Rep. 50. a. 2 Inst. 513. 4 Inst. 270. Co. Read. 3.

In a case of this kind, if the lord of the manor is a party to the fine, it can never afterwards be reversed, Salk. 57. Fitz. N. B. and the lands become subject to the jurisdiction of the courts at *Westminster*, for the privileges of antient demesne being established for the mutual benefit of the lord

- and tenant, they may agree to destroy them. But if the lord is not a party to the fine, he may have a writ of *disseisin* to reverse it, and restore himself to his rights.
- 2 Inst. 513. infra, ch. 15.* Fines may be levied in the courts of cities and corporate towns by custom, where such courts have power to hold pleas of land.
- Courts of Cities and Corporate Towns.* Thus *Madox* has published a record of a fine levied in the town court of the city of *Coventry*, before the mayor and bailiffs of that town; and also a fine levied in the town court of *Fordwich*, to which king *Henry 8.* was a party.
- Form. Angl. No. 379.*
- No. 394.*

CHAPTER VI.

Of the Parties to a Fine.

A Fine being considered as a common assurance or conveyance of real property, it follows, that all persons of full age and sufficient understanding, may, in general, levy fines of those lands in which they have any estate of freehold, by right or by wrong; although, if a bare tenant for life levies a fine, it will in many cases operate as a forfeiture of his estate. *Infra, ch. 14.*

There are several records of fines published by *Dugdale* *The King.* and *Madox*, to which the King is a party. It was however much doubted in the reign of *James I.* whether the king could levy a fine; and his majesty having consulted *Dugd. Orig. Jur. 93.* Lord Chief Justice *Popham* and Sir *Edward Coke* (then attorney general) on this subject, they gave it as their *Madox Form. no. 394.* opinion, that although the king could not be cognizor of a fine, because a writ of covenant could not be brought against him, yet, that if a fine was levied to the king, he might then make a grant and render, which would be good and sufficient to bind him. *7 Rep. 32.*

The queen may levy a fine, and a fine may be levied to her; for she has, in every instance, the particular privilege of suing, and being sued alone, and is considered in all legal proceedings as a *feme sole*, and not as a *feme covert*. *The Queen. 1 Inst. 3. a. 133. a. 4 Rep. 23. b.*

As married women might always be impleaded jointly with their husbands, it follows, that they could join with their husbands in levying fines: and it appears from a passage in *Glanville*, and some very antient records published by *Madox*, that it was formerly usual for married women to appoint their husbands as their attorneys, to levy the fine for them. *Married Women. Lib. 11. c. 3. Form Angl. No. 357.*

Thus in *q Ric. 1.* the prior and convent of *Lewis* fined to the king in half a mark, *ut concordia facta inter Ricardum de La Combe, & Sybillam de Dene, uxorem suam, presentes per eundem Ricardum virum suum, positum loco suo, ad lucrandum vel perdendum, et Willielmum priorem, et conventum de Lewis tenentem, per Willielmum monarchum suum* *Madox Diff. 1. 18.*

suum de advocacione ecclesie de Waldern, unde recognitio de ultima presentatione summonita fuit inter eos, in prefata curia scribatur in magno rotulo.

It is probable that married women were, in consequence of this practice, frequently deceived, and defrauded of their inheritances by their husbands. The statute *de modo levandi fines* therefore directed, that if a feme covert be one of the parties to a fine, she ought first to be examined by the justices, and if she refused her assent to the fine, it should not be levied.

18 Edw. 1.
2 Inst. 515.

2 Inst. 515.
3 Atk. 712.

When a married woman is party to a fine, she ought to be examined secretly and apart from her husband, pursuant to this statute, that the judges or commissioners may inform themselves whether she joins in the fine of her own free-will, or is compelled to it by the threats and menaces of her husband. Every thing contained in the writ should be distinctly named to her; and she ought to be informed of the consequences of her assenting to the fine. But although the statute *de modo levandi fines* thus positively directs the private examination of a married woman, yet if she is allowed to acknowledge a fine without being examined, it will bind both her and her heirs for ever, there being no mode of reversing such a fine; because it cannot afterwarde be averred, that the married woman was not examined, the contrary being recorded.

The private examination of a married woman is, however, not directed in all cases, as that circumstance was prescribed by the legislature, only to prevent married women from making an imprudent disposition of their property at the instance of their husbands; so that where a husband and wife acquire any interest by a fine, and depart with nothing, the wife need not be examined, because in that case she cannot possibly be prejudiced. It may therefore be laid down as a certain rule, that a married woman need only be privately examined in levying a fine, where she joins in granting some estate, or departing with some interest.

Roll. Ab.
Tit. Fine,
(M. 1.)

7 Rep. 8. a.
10 Rep. 43. a.

Thus if a fine be levied to a husband and wife who grant and render a rent, the wife ought to be examined; because by the render she makes herself liable to the payment of the rent.

If a married woman levies a fine of her own inheritance without her husband, it will bind her and her heirs, because

cause they will be estopped to claim any thing in the lands, and cannot be admitted to aver that she was a married woman, that being contrary to the record. But her husband may enter and defeat such fine, either during the coverture, to restore himself to the freehold which he held *jure uxoris*, or after her death, to restore himself to his tenancy by the curtesy; because no act of feme covert can transfer that interest which the marriage has vested in the husband; and if the husband avoids the fine during the coverture, neither the wife nor her heirs will be barred by it: for, by the entry of the husband, the whole estate which passed by the fine is defeated, and the old estate of the wife re-vested in her, and the husband becomes again seised in right of his wife.

Even an entry by the husband into part of the land, whereof the wife alone levied a fine, will avoid the whole fine. Inst. 46. a.
Hob. 225.

If a married woman levies a fine executory as a feme sole, and execution is sued against the husband and wife, the husband may stop the execution of the fine, because no act of his wife's can prejudice him. And if in a case of this kind the husband had made default, and his wife was received in his stead, she might, for the benefit of her husband, prevent the execution of her own fine; but, after the death of her husband, she cannot avoid it. Mayo v. Combes,
1 Freem. Rep. 396.
Co. Read. 7.
Perkins, f. 20.

If a woman levies a fine by the name of *Mary*, the wife of *Thomas Stiles*, it will be void; because it appears by the very record itself that the cognizor was a married woman. 1 Siderf. 122.

It is agreed that a wife may, without her husband, execute a naked authority, though no special words are used to dispense with the disability of coverture: but if the legal estate in lands is vested in a married woman in trust for another, some hold that she cannot pass it to the *cestui que trust* unless her husband joins; and therefore, that if she makes a feoffment, or levies a fine without him, the first will be void, the latter voidable: but others are of opinion, that the husband's joining is not more requisite in this than in the former case. W. Jones
137.
1 Inst. 112. 2.
no. 6.

The following is the only case where a married woman has been allowed to levy a fine without her husband.

Upon a motion that *Ann Moreau*, wife of——*Moreau's* *Moreau*, might levy a fine without her husband, it appeared case, 2 Black.
that Rep. 1205.

that the lands had been sold by the husband, who covenanted that he and his wife (when of age) should levy a fine. When the wife came of age she refused to join in it; but it was levied by the husband alone, who afterwards went abroad. The wife now consented to levy it, but the husband was absent. It was said that it had been usual in such cases for the curfitor to make out a *præcipe* to the wife as a feme sole; but no example of it was produced upon the motion. The court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the Lord Chief Justice then in court.

Persons outlawed, &c.
West. Symb.
p. 2. f. 13.

Persons outlawed or waved in personal actions may alien by fine; for their estates still remain in them, although they have forfeited the rents and profits.

Co-parceners, Joint-tenants, and Tenants in common,

1 Rep. 58. a.
6 Mod. 45.
1 Salk. 286.

Co-parceners, joint tenants, and tenants in common, may levy fines of their respective shares; and if there be two joint-tenants in fee, and one of them levies a fine of the whole, this will not amount to an ouster of his companion: but it is a severance of the jointure, though they continue to be in of the old use.

Persons who are blind, deaf or dumb.
Mr. Elliot's Case,
Carter 53.
Griffin v. Ferrers.

Persons who are blind, deaf, or dumb, or who are both deaf and dumb at the same time, may levy fines, if it appears that, notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a fine, and can express their meaning by writing or signs*: and there are three instances of persons born deaf and dumb who were, notwithstanding, permitted to levy fines.

Who are disabled from levying Fines.

Having enumerated the persons who are capable of levying fines, we shall now examine who are disabled from being cognizors, or conveying by fine. This disability may arise either from want of a sufficient estate in the lands, a competent degree of judgment and understanding, or from being incapacitated by their situation, or by some positive act of parliament.

Persons who have no Estate in the Lands.
Shep. Tou. 1
14 West.
Symb. p. 2.
f. 13.

No person can levy a fine of lands unless he has at least an estate of freehold in them, either by right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it; so that in every case where a fine is levied, and

* Cases of Pract. 19. Keys v. Bull, id. 23.

none of the parties to such fine have any estate of freehold in the lands, whereof the fine is levied, it may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time when the fine was levied.

Infra. ch. 15.

Thus if a person who is only possessed of lands for a term of years, or who holds them by statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine; it will have no effect whatever as to strangers.

A copyholder cannot upon this principle levy a fine of Co. Cop. his copyhold, because the freehold is in the lord, and the copyholder is in fact only tenant at will. *f. 55.*

The tenant in possession will not be allowed as an evidence, to prove the estate of his landlord who levies a fine, because he would then be a witness to support his own possession. *Doe v. Williams. Cowper 621.*

The only mode by which a tenant for years or a copyholder can levy a fine, so as to give it any force, is by first making a feoffment, by which he acquires the freehold by disseisin. *1 Vent. 241. 1 P. Wms. 519. 3 Atk. 352. 4 Brown. 407. Co. Cop. f. 55.*

A fine levied before entry or receipt of rent, will be void upon the same principle.

Thus where upon a bill filed for a share in the New River Water, the defendants pleaded a fine and non-receipt of rent until after the fine was levied; Lord Hardwick said there was not a sufficient seisin to support the fine. His lordship also observed that the evidence of receipt of rent if the jury had believed it, would be considered as a sufficient possession to levy a fine. *send v. Ash. 3 Atk. 336.*

A person having a defeasible right only to lands, may notwithstanding levy a fine of them, which cannot be set aside by the plea, that neither of the parties had an estate of freehold in the lands.

Thus where Sir Michael Armin being seised in fee of the manors of *Pickworth* and *Willoughby*, by his will devised, that in case his personal estate, &c. should not be sufficient to pay his debts, then his executors should receive the rents and profits of his whole real estate, and after payment thereof, he devised the manors of *Pickworth* and *Willoughby* to his uncle *Evers Armin* for life, and in case he should have issue male, then to such issue male and his heirs for ever; and in case he should have no issue male, *Carter v. Barnadiston, 1 P. Wms. 505. 13 Vin. Ab. 336.*

male, he devised the manor of *Willoughby* to his nephew *Sir Thomas Barnadiston* in fee. Upon the death of *Sir Michael Armin*, *Evers Armin* entered upon the premises devised to him, and devised them to his grandson *Armin Bullingham* and the heirs of his body. Upon the death of *Evers Armin*, *Sir Thomas Barnadiston* entered upon the premises, claiming the same by virtue of the remainder limited to him by the will of *Sir M. Armin*. *Armin Bullingham* the devisee of *Evers Armin* entered upon the manor of *Willoughby*, claiming title thereto, and put his cattle into some part of the land, upon which ensued a replevin and the special verdict in 3 *Lev.* 431. and 2 *Salk.* 224. This suit was afterwards compromised between *Sir Thomas Barnadiston* and *Armin Bullingham*, who both joined in a fine of the manor of *Willoughby*; but previous to this, *Sir Thomas Barnadiston* had conveyed the premises by lease and release to *Sir Samuel Barnadiston* in mortgage.

It was contended that this fine was void, as neither of the parties had an estate of freehold in the land; but the lord chancellor held, "that in this case it could not be said that *partes finis nihil habuerunt*, because *Armin Bullingham* on the death of *Evers Armin*, and as his devisee had a right against all persons whatsoever but the heir of *Sir Michael Armin* the testator, and *Barnadiston*, entering upon him as a disseisor; and though *Barnadiston*, afterwards mortgaged the premises in fee, yet he continuing in possession thereof, and joining with *Bullingham* in the fine, it could not be said *partes fines nihil habuerunt*, when one of them, viz. *Barnadiston* had the possession, and the other of them, viz. *Bullingham* had the right to the land against *Barnadiston*, and also against his mortgagee."

There are few exceptions to this rule. Thus a *cestui que trust* may levy a fine of his trust estate, although he is only tenant at will to his trustees, the reason of which will be explained in a subsequent part of this work.

3 Rep. 29. b.
Ante, p. 28.

So a fine levied by a vouchee to the demandant; or a fine from the demandant to the vouchee would be good; because in law the vouchee is supposed to be tenant of the land, though in fact he never is so at present.

Persons who
want Judg-
ment and Un-
derstanding,

All those who from a deficiency of judgment or understanding, are incapable by law of contracting, are like-
w.c.

wise incapable of being cognizors in a fine: but with respect to persons of this description it will be proper to premise one observation, that whatever legal defects may be in the cognizor, if the judges or commissioners once admit him to levy a fine, such fine will for ever afterwards be as valid and effectual as if the cognizor was not under any legal disabilities, except in the case of an infant; although the judges or commissioners omit a very necessary part of their duty, in permitting such persons to levy a fine.

This rule arises from a principle which has been mentioned in a preceding part of this work, that no averment can be made against any fact which is once upon record, and as the admission of a person to levy a fine supposes him to be free from all legal defects and disabilities, (for the law will never presume that the judges under whose inspection the fine was levied, would allow it to pass unless the parties were capable of levying it); therefore, although the fact should be otherwise, yet no averment can ever afterwards be admitted to the contrary.

By the common law infants or persons under the age of 21 years, are incapable of binding themselves by any contract, which may turn to their prejudice, on account of their supposed want of judgment and discretion at that period; in consequence of this principle an infant is incapable of being cognizor in a fine, but if an infant is permitted to levy a fine, and that fine is not reversed during his minority, it must for ever afterwards stand good (a).

The reason that an infant is restrained from reversing a fine levied by him, unless it is done during his minority, is, because that fact can only be tried by an inspection of his person in open court.—*Non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo.* 1 Inst 131. a. 380. b. This 12 Rep. 123.

(a) In the Rolls of Parliament 50 Edw. 3. No. 127. vol. 2. p. 342. there is a petition from the commons, complaining of the very great hardship of not permitting a person who had levied a fine when an infant, to reverse it, after he attained his full age, and praying that every person who had levied a fine during his infancy, should be allowed a certain time, such as two years after he attained his full age to reverse it; to which the king answered, that he would consider against the next parliament, whether it would be proper to alter the old law, in this point, or not.

This mode of trial is adopted, because every judicial act shall be intended to have been rightly done, until the contrary appears; and therefore it is fitter that the propriety of such an act should be tried by the court, than by a jury.

9 Rep. 31.

In cases of this kind a writ issues to the sheriff, commanding him to constrain the party to appear, that it may be ascertained by the inspection of his person, whether he be of full age or not; *ut per aspectum corporis sui constare poterit, justiciariis nostris, si prædictus A. sit plenæ atatis necne.*

2 Roll. Ab.
573.

The judges may also examine the infant upon an oath of *voir dire*, or any of his parents, and inform themselves by means of church books, or any other kind of evidence, if there should still remain a doubt respecting the age of the party.

3 Atk. 711.

The peculiar privilege thus given to infants, of averring against a record during their infancy, is probably owing to this cause. The judges or commissioners who take the acknowledgment of fines, are supposed to inspect the age of all those who acknowledge a fine before them, pursuant to the directions in the statute *de modo levandi fines*; and if, after such inspection, they are permitted to levy a fine, it is presumed they are of sufficient age; and the infant therefore cannot in that court aver his disability: but if upon a writ of error brought in a superior court he is inspected, and found not to be of full age, the fine may be reversed; because the public inspection of an infant by the judges in a court of record, is of equal notoriety and authenticity with a former record of the infant's having levied a fine, (which supposes him to be of full age); and therefore, as both facts are recorded, and contradict one another, the latter fact will prevail.

12 Rep. 122.

If infancy were permitted to be tried by any other mode than the personal inspection of the infant in a court of record, averments might be made many years after a fine had been levied, that the person who acknowledged it was an infant at the time, by which means records might be avoided by bare averments, which would be productive of the greatest confusion.

1 Inst. 131. a.
Idem 380. b.
Keckwith's
Cale,
Moo. 844.

If the person of an infant be inspected by the judges, and it is once recorded that he is within age, although the infant should die, or attain his full age, before the fine

fine is reversed, yet he or his heirs may reverse it at any time afterwards.

Thus where an infant acknowledged a fine, and the cognizee omitted to get it ingrossed until the infant should attain his full age, in order to prevent him from bringing a writ of error; the court, upon a view of the cognizance produced by the infant, and upon his prayer to be inspected, and to have his nonage recorded, inspected him, and recorded his infancy, in order to give him the benefit of his writ of error; which he must otherwise have lost, as his nonage determined before the next term.

Sarah Griffith's Case,
12 Mod. 444.

The principles here laid down respecting fines levied by infants are confirmed by the following cases: *Ann Hungate's case*, 12 Rep. 122. *Warscomb v. Carrell*, *idem* 124. *Herbert Parrot's case*, 2 Vent. 30. *Hutchinson's case*, 3 Lev. 36. *Sherlock's case*, Sty. 457. *Cousin's case*, 1 Vent. 69. And *Requisbe v. Requisbe*, Bull. p. 2. 320.

By the statute 7 Ann. c. 19. it is enacted, That it shall and may be lawful for any person under the age of twenty-one years, by the direction of the court of Chancery or Exchequer, on the petition of the persons for whom such infants shall be seised or possessed in trust, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said courts shall direct.

Upon a petition in Chancery, praying that an infant, the heir of a mortgagee in fee, who was likewise a feme covert, might convey by fine under this statute, the master reporting it necessary: Lord Chancellor Hardwicke said this question came before him soon after he had the seals, and that he consulted with Lord Chief Baron Comyns, who thought the court might order an infant who was a feme covert to levy a fine: for the act is general, that all persons under age shall convey and assure; and that as a feme covert of full age could not assure but by fine, the court may direct an infant to convey in the same manner; and an order was made accordingly.

Ex parte
Maire,
3 Atk. 479.
Com. Rep.
615.

Idiots, lunatics, and generally all persons of nonsane memory, are incapable of levying fines; and the statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to acknowledge a fine: but still, if the judges or commissioners allow them to levy a fine, it can never afterwards be reversed by any averment

Lombe
v. Lombe.
Barnes 217.
S. P.
Idiots and Lunatics.

4 Rep. 124. ment that the cognizors laboured under any of those disabilities, because the record and judgment of the court being the highest evidence in the law, the cognizors must be presumed to have been capable of contracting at the time, and therefore no averment can be admitted to the contrary: and it is said that even a declaration of the uses of a fine by an idiot or lunatick will be good.

12 Rep. 124. Thus where one *Henry Busbley*, a monstrous and deformed cripple and idiot, was taken from his guardian, and carried to a place unknown, where he was kept in secret, until he had acknowledged a fine of his lands before Justice *Southcot* to one *Bothome*, and had declared the use of the fine to *Bothome* and his heirs.

Henry Busbley was afterwards found by inquisition to have been an idiot, *a nativitate*, and upon an action brought by a person who claimed under *Bothome*, the idiot was sent out of the Court of Wards upon a man's shoulders, to be shewn to the judges of the court of Common Pleas. Lord Chief Justice *Dyer* said, that the judge who took the fine was not worthy to take another: but notwithstanding this, and although the monstrous deformity and idiocy of *Busbley* was apparent and visible, yet the fine stood good.

It was moved as a doubt in the Court of Wards, whether this fine should not enure to the use of the idiot and his heirs; for although it was agreed, that the fine, being of record, bound the idiot, yet it was contended, that the deed, executed by the idiot, was not sufficient to direct the uses of the fine; but it was resolved, "That for as

2 Rep. 58. a. "much as he was enabled by the fine as to the principal,
Hob. 224. ("he should not be disabled to limit the uses which are
Vide infra, ("but as accessory.

ch. 15. So, where one *Hugh Lewing*, who was an idiot, and
Hugh Lew- so found by office, levied a fine, and declared the uses
ing's Case, of it by indenture, it was resolved in the Court of Wards
10 Rep. 42. by the Lords Chief Justices *Wray* and *Dyer*, that both
Winch. 106. the fine and declaration of uses should stand good, as
neither *Hugh Lewing* nor his heirs could aver that he was
an idiot: and it was said by the court, that they would
sooner suppose the office found to have been erroneous,
than bring a judicial act into question, or the judgment
of the court in which the fine was levied.

A complaint

A complaint was made to the court of Common Pleas by *Thomas Cust*, supported by many affidavits, setting forth, that *Johanna Lister*, one of the cognizors in a fine lately levied, had for some years past been disordered in her senses, and was so at the time when the said fine was levied. The court thereupon made a rule, to shew cause why the fine should not be vacated, and for *John Hancock*, one of the commissioners, (who, with two others, took the fine by *dedimus potestatem*), to answer the matters in the affidavits. Upon an enlargement of the rule, the court recommended it to them to produce the said *Johanna Lister*, who resided in *Yorkshire*; and accordingly she was brought into court: and being examined by the Lord Chief Justice, appeared to be a person of good capacity, and very well to understand the intent of a fine, and the deed declaring the uses thereof, which was in favour of her husband, with whom she had lived many years, and upon whom she was desirous to settle her estate, and prevent its descending to the said *Thomas Cust*, her nephew and heir at law. The court discharged the rule, with costs of the application, and the expences of the said *Johanna's* journey to *Westminster*, to be paid by *Cust*.

Lister v. Lister,
Barnes 218.

Corporations aggregate cannot levy fines; because, as they are invisible bodies, they can only appear by attorney: whereas the statute *de modo levandi fines* requires, that the parties to a fine shall appear personally before the judges. But Sir *Edward Coke* says that a sole corporation may acknowledge a fine.

Corporations.
Co. Read. 7.

There are some persons who are restrained from levying fines among other modes of alienation by particular statutes.

Thus by the statutes 11 *Hen. 7. c. 20.* and 32 *Hen. 8. c. 28.* Women seised of jointures or estates tail of the gift of their husbands; and husbands seised *jure uxoris*, are prohibited from levying fines of such estates. An account of these statutes, and of the several cases which have been decided on them, will be given in recoveries.

All ecclesiasticks seised in right of their churches, as archbishops, bishops, deans and chapters, masters and fellows of colleges, &c. are restrained by a variety of statutes from alienating their church lands, for any longer time than for three lives or twenty-one years, by which

Ecclesiasticks
seised jure
Ecclesie.

1 *Eliz. c. 19.*
5.

13 *Eliz. c. 10.*

which they are by implication prohibited from levying fines.

*What Persons
may take
Lands by
Fine,
Shep. Tou. 7.*

With respect to the persons who are capable of being cognizees, and of taking any estate by fine, it will be sufficient to observe, that all those who are enabled by the common law to take by way of grant, may also take an estate by fine, as infants, married women, corporations sole or aggregate, (for an estate may be taken in a fine by attorney); or any other person, except those who are considered in law as civilly dead.

CHAPTER VII.

Of what Things a Fine may be levied.

A FINE may be levied of every species of real Co. Read. 11.
property, as of an house, manor, castle, office,
Ec. and in general it may be laid down as a certain rule,
that a fine may be levied of every thing, for which a
præcipe quod reddat may be brought. There are even
some things whereof a fine may be levied, although a
præcipe quod reddat cannot be brought for them, as an
office, for which neither a *præcipe* nor an affize lies, but
only a *quod permittat*. So a fine may be levied of a rent Idem. Shep.
newly created, and yet no *præcipe* will lie for it. Tou. 11.

A fine may be levied of an advowson, or of a right of 8 Rep. 145. a.
presentation, of which there are a variety of instances in
the books.

A fine may be levied of a rent charge, or of a chief Shep. Tou. 11.
rent; and if a person who has a rent charge levies a fine Cro. Jac. 699.
of the land out of which the rent charge issues, it will Carter 24.
bar the rent charge, although the fine was levied of the 1 Stra. 106.
land, and not of the rent charge. 1 Vesey 391.

A fine may be levied of any thing which lies in *prendre*,
provided it can be ascertained with sufficient accuracy.
But of things uncertain, such as a common without
number, a fine cannot be levied.

As fines may be levied of things in possession, so they Shep. Tou. 12.
may also be levied of lands, tenements, or hereditaments,
in remainder or reversion.

At the dissolution of monasteries by Hen. 8. the appro- Tithe, &c.
priations of the several parsonages which belonged to the
religious houses became vested in the king, who granted
them to lay persons: and, in order to enable such lay
persons to exercise every act of dominion over their new
acquisitions, it was enacted, by the statute 32 Hen. 8. c.
7. f. 7. " That writs of covenants, and other writs for
" fines to be levied, and all other assurances to be had,
" made, or conveyed, of any parsonage, vicarage, por-
" tion, pension, or other profit, called ecclesiastical or
" spiritual,

“ spiritual, as is aforesaid, shall be hereafter devised and
 “ granted in Chancery, according as hath been used for
 “ fines to be levied, and assurance to be had or made,
 “ or conveyed, of lands, tenements, or other heredita-
 “ ments: and that all judgments to be given upon any
 “ of the said writs original, so to be devised or granted,
 “ of or for any of the premises, or any of them; and all
 “ fines to be levied and acknowledged in any of the
 “ king’s said courts thereof, shall be of like force and
 “ effect in the law, to all intents and purposes, as judg-
 “ ments given, and fines levied of lands, tenements,
 “ and hereditaments, in the same courts, upon writs ori-
 “ ginal therefore, duly pursued and prosecuted: albeit
 “ no such form of writs original out of the said court of
 “ Chancery have heretofore proceeded or been awarded.”

2 P. Wms. 127.

A fine may be, and is usually levied of New River shares, by the description of so much land covered with water; and whenever a fine is necessary to be levied of such shares, as the New River runs through three counties, *Hertford, Middlesex, and London*, there must be three several fines for each of those shares, one being necessary for each county.

3 Rep. 88.

A fine may be levied of an undivided moiety, or fourth part of a manor, as well as of the whole.

Warwick v. Edwards.

2 Brown 494.

1 P. Wms.

130.

A fine cannot be levied of money, or of the trust of money; and therefore, where a sum of money is covenanted, or directed to be laid out in lands, which are to be conveyed to the same uses as other lands comprised in some particular settlement, although the money is considered by the court of Chancery as land in every other respect; yet if a tenant in tail under such a settlement, levies a fine of the settled estate before the money is vested in land, still the money will go in the same manner as if no such fine had been levied.

By what Descriptions.

With respect to the descriptions which are necessary to be used, of those things whereof fines are levied, they should be the same as those which are used in a *præcipe quod reddat* in an adversary writ. But a fine being now considered as a common assurance or a conveyance by consent, it is not construed as strictly as a judgment in an adversary suit. Thus an honor may pass in a fine by the name of a manor, or by its proper name; so a reversion may pass by the name of land or by the word right.

Vide Recoveries. ch. 8.

Shep. Tou. 11.

Where

Where a fine is levied of a manor, nothing but a real manor will pass, and not a manor by reputation only.

Thus where a fine is levied of certain lands which were usually known by the name of the manor of *North Peverton*, and it was adjudged that this being only a manor in reputation, nothing passed by the fine.

Mallett v. Mallett.
Cro. Eliz.
707.

Land is to be demanded by the certain measure of its quantity, according to the usual mode by which it is measured, as an acre, oxgang, hyde, rood, &c. and by the names which are usually given to the different species of land, as pasture, arable, meadow, &c.

Shep. Tou. 12.

Where a fine was levied of a certain number of acres of land, it became a question whether the acres were to be considered as customary acres, or according to the statute *de terris mensurandis*, nor does it appear how the case was determined; but Sir *Edward Coke* mentions a case where it was adjudged that in a common recovery of a certain number of acres of land, they should be estimated according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*.

Waddy v. Newton,
8 Mod. 276.

Sir J. Bruyn's case.
6 Rep 67. a.

The particular vill or hamlet, parish, town and county in which the lands lie, ought also to be mentioned in the fine; for it was formerly held, that if the particular vill in which the lands were situated was not specified, they would not pass.

Thus where there were two vills, *Walton*, and *Street*, in the parish of *Street*, and a fine was levied of certain lands in *Street*; it was determined that the lands in *Walton* did not pass by it, for *Street* and *Walton* being distinct vills, although they were both in the parish of *Street*, the lands in *Walton* were not comprised in the fine, but that if the fine had been levied of lands in the parish of *Street*, generally, without mentioning either of the vills, the lands in *Walton* would then have passed.

Stork v. Fox,
Cro. Jac. 426.

The courts have latterly adopted more liberal ideas respecting the construction of fines in this respect, and shewed more regard to the agreement and intention of the parties.

Thus where it was found by special verdict that *John Easton* tenant in tail of a messuage and lands called *Easton's*, lying in *Bishop Marchard*, levied a fine thereof by the name of a messuage, and two hundred acres of land,

Ravely v. Easton, Cro.
Car. 269, 276.

fifty acres of meadow, &c. in *Effington*, *Easton*, and *Chilford*, and that there was not any vill or hamlet, or place known by the name of the messuage or tenement called *Eastons*, and that none of the said tenements were in *Effington* or *Chilford*. It was argued that the fine was void, because the vill or hamlet in which the lands were situated was not named; but it was resolved that the fine being drawn according to the writ of covenant, and the writ of covenant being conformable to the deed in pursuance of which the fine was levied, and to the intention of the parties, it was good.

Waldron v.
Rufcarit.
1 Vent. 176.

So where it was found that a person levied a fine of all his lands in *St. Inderion* in *Connwall*, that he had lands in *Portgwyn*, and that the constables of *St. Inderion* exercised their authority in *Portgwyn*, and that *Portgwyn* had a tythingman. The question was, whether the fine passed the lands in *Portgwyn*. The court determined that it did, and said that a parish may contain ten vills; and if a fine be levied of lands lying in that parish, it will pass lands situated in any of those vills.

Steed v.
Courtneys,
1 Leop. 188.

The word tenement is not a sufficient description of any thing whereof a fine is to be levied; for a tenement may consist of an advowson, a house, or land of any kind; and therefore a fine levied of a tenement is void, or at least voidable by writ of error; but a fine of a messuage or tenement would probably be now held good.

3 Will. Rep.
35.
Shep. Fou. H.

Parsonages, rectories, advowsons, vicarages, or tithes impropriate, pass not by the words *the advowson of the church of S.* but by the words, *the rectory of the church of S. with the appurtenances*. When a fine is levied of a presentation, then the words are *of the advowson of the church of S.* and not, *with the appurtenances*; and of all vicarages endowed, the writ must be *of the advowson of the vicarage of S.* and not with the appurtenances.

Gilb. Ev. 38.

If a person has two manors, which are both known by the name of *Dale*, and he levies a fine of the manor of *Dale* generally, circumstances may be given in evidence to prove which manor was intended to pass by the fine.

2 Brown 466.

Where a fine and recovery are of a certain number of acres in *Dale*, it is said, that the party interested shall have his election, where and in what parts of the estate the fine and recovery shall operate.

It

It is also said, that the deed by which the uses of a fine and recovery are declared, is the measure by which juries usually go in ascertaining the description of the estates whereof a fine is levied; and the courts of justice have frequently directed the description of lands in a fine to be amended in conformity to the deed of uses. But a fine will not pass a greater number of acres than are contained in the writ and concord, although the deed of uses mentions more. Brown 156.

A fine does not ascertain, but only comprises the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses, that the precise lands comprehended in the fine, and intended to pass by it, may be precisely ascertained. Jenk. 254.

There are frequent instances of tenants in fee simple, who, in levying fines, insert more parcels of land than do actually belong to them: in which cases Lord Hardwicke says, a court of equity will restrain the operation of the fine, to such lands only as do really belong to the parties. 2 Atk. 241.

CHAPTER VII.

Of the Amendment of Fines.

FINES being now considered as common assurances made with the consent of the parties, the court of Common Pleas has frequently permitted them to be amended, where any palpable mistake or mispension has been made by the officers of the court in the entry of the king's silver, the proclamations, or the description of the land. The judges have even in some instances directed the original writ upon which a fine has been levied to be amended, but the propriety of such amendments seem, from some modern determinations, to be extremely doubtful.

Gage's Case,
5 Rep. 45. b.

A writ of error was brought to reverse a fine; and the error assigned was, that the writ of covenant bore *teste* the 24th of *April*, returnable *quind. Pasch.* which was the 15th of *April*; so that the return was before the *teste*. It was resolved by the whole court that the writ should be amended, because fines were nothing more than common assurances, entered into with the mutual consent of the parties.

This case, however, is said to be totally misreported; and the doctrine here laid down, that an original writ may be amended, has been contradicted by the following determination.

Lord Pembroke v. Lord Jeffries,
1 Salk. 52.
Cases Temp.
Holt. 59.

Lord Pembroke petitioned the House of Lords, for a bill to set aside an amendment made in a fine and recovery, by the court of Great Sessions in Wales. It was referred to the judges, whether the fine and recovery were amendable in those particulars in which they had been amended, and whether such amendments were warranted by law. One of the amendments was in the original writ, which had been tested six months after the *dedimus* for the caption. Lord Chief Justice Holt certified the opinion of the judges to be, that the writ of covenant being an original writ, was not amendable, either by the common

common law, or by any statute. That neither the 14 *Edw.* 3. nor the 8 *Hen.* 6. warranted such an amendment. That as to this purpose, there was no difference between adversary actions and amicable ones; for no court could amend a mistake in a deed, which was as much a common assurance as a fine of recovery; and that *Gage's* case was misreported, and was not law.

In Lord *Raymond's* Reports, vol. 2. 1066. it is said by Mr. Justice *Powell*, That the *teste* of an original writ was not amendable: that it was so resolved by the House of Lords, with the concurrent opinion of all the judges, upon consideration of *Gage's* case, in the case of Lord *Jeffries*; and a judgment given in *Wales* upon the authority of that case was reversed; and upon that occasion the record of *Gage's* case was searched for, and found not to warrant the report. And *Holt* Chief Justice said, that the record of *Gage's* case is in *Coke's* entries, tit. error, p. 9. 250. where the judgment of the court is contrary to the report; for the writ was not amended, but the fine was reversed.

In a late case, the court of Common Pleas refused to amend the return of a writ of covenant on which a fine had been levied; because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir *William Blackstone* observes, that the court gave no opinion as to the propriety of such an amendment in a fair case.

Lindsay v.
Gray,
2 *Black.*
Rep. 1013.

A mistake in the entry of the king's silver will be allowed to be amended.

Thus where a husband and wife being seised of the manor of *Empoles*, levied a fine thereof by the name of the manor of *Empoles*, and of a great number of acres of land, meadow, &c. according to the common form of fines; and the manor and tenements were valued at twenty marks *per annum*; so that the fine in the *Hanaper* was *l. 1. 6s. 8d.* and therefore the king's silver, or post-fine, amounted to 40s. The clerk made the entry of the king's silver in this form: *Nich. Bohun dat Domina Regina, 40s. pro licentia concordandi, &c. in placito conventionis* of so many acres of land, meadow, &c. omitting the manor: and error being assigned on this point, because the king's silver was not mentioned to be paid, as well for the manor as for the other tenements, it was resolved by

Bohun's Case.
3 Rep. 43.

by all the judges, that the roll of the entry of the king's silver should be amended according to the writ of covenant; the note, the foot, and the certificate of the judges, in these words: *de manore de Empoles, cum pertinentiis ac, &c.* which were omitted through the negligence of the clerk; for it appeared that the whole sum was paid, as well for the manor as for the residue of the tenements; so that no prejudice was done to the queen.

The proclamations in a fine may also be amended, even after a writ of error has been brought, in which a defect in the proclamation is assigned for error.

Dowling's
Case,
5 Rep. 44.

Down's Case,
Id.

Pettus
v. Godsalve,
13 Rep. 54.

Thus the proclamations which were indorsed on the foot of the fine were, pending a writ of error, allowed to be amended, according to the proclamations on the note of the fine remaining with the chirographer. And, in another case, the proclamations of a fine were allowed to be amended, after a writ of error had been brought, in which that circumstance was assigned for error.

So where a mistake was made in the third proclamation on the foot of the fine, and the fourth proclamation was altogether left out; but it appearing that the proclamations upon the record remaining with the chirographer, and in the book of the chirographer, were properly made, it was adjudged that the errors in the proclamations should be amended.

Strilley's
Case,
Hut. 122.

In the same manner, where a fine was levied in *Mich. 11 Eliz.* and the proclamations indorsed by the chirographer, were right. But in the note of the fine delivered to the *custos brevium*, the second proclamation appeared to have been made on the 20th of *May*, where it should have been the 23d of *May*. The court held that it should be amended; for the ingrossment upon the fine by the chirographer is the foundation, which being right, is a sufficient warrant to amend the other, though the court held it a good fine without any amendment.

The description of the lands intended to be comprised in a fine is frequently erroneous; but in such cases, whenever the description is contrary to the intention of the parties, it will be amended, provided such intention appear from the deed to lead the uses of the fine, or any other sufficient circumstances.

Tregeare
v. Gennys,
Com. R. 587.

Thus where it appeared to the court, after the examination of the plaintiff and deforciant, the inspection of a fine

fine levied between the parties, and the indenture declaring the uses of the fine, that by the omission or misprision of the clerk who made and ingrossed the *præcipe* and concord of the said fine, he supposed the said tenements to lie among others in the parish of *Lanceston*, when in fact there was no such parish within the whole county of *Cornwall*; but it ought to have been in the parish of *St. Stephen's*, near *Lanceston*. It was ordered by the court, that as well the *præcipe* and writ of covenant, as all entries and records of the said fine, should be amended and rectified, by putting in the words *St. Stephen's near*, as, by law, it ought to be done.

So, where a motion was made to amend a fine, by inserting the word *Woorth*, and, on shewing cause, the rule was made absolute for the amendment, although it was objected, that the heirs at law would be prejudiced by the amendment. But the court said, they could not take notice whether it would be prejudicial to the heirs at law or not, as it was the duty of the court to make the fine agreeable to the deed of uses, and to the intention of the parties.

Two fines of lands in the island of *Antigua* were ordered to be amended, upon hearing counsel for the cognizee and the heirs at law of the cognizors, who had brought writs of error to reverse the fines. The lands were described in the writs, &c. *In insula de Antegoa in America in partibus transmarinis, viz. in parochia Sanctæ Mariæ Islington in Comm. Midd.* The amendment was by striking out the words in *America in partibus transmarinis*. Articles of agreement between the parties to the fines, to convey and assure the lands in the island of *Antigua*, were read, and, *per curiam*, the repugnancy inserted merely through want of skill, and which would vitiate the fines, must be rejected, and the fines made effectual; that is in common form, if they be then insufficient, advantage may be taken thereof.

So a fine levied in 1 *Geo. 1.* was ordered to be amended according to the deed of uses, by striking out the word *parochia*, and inserting the word *parochiis*; and also by inserting the words *et Melbmerby*. And in *Pasch. 10 Geo. 3.* a fine levied in the reign of queen *Ann* was amended by a deed of settlement upon marriage, by altering the name of a parish in the fine, from *Coxley* to *Corley*,

Walter
Okenden.
Cases of Pract.

52.

Forster
v. Pollington
1.
Barnes 216.

Craghill
v. Pattison,
Barnes 24.

Bohoun
v. Burton,
3 Will. R. 58.

Powell
v. Peach,
2 Black.
Rep. 1202.

Corley, upon reading the deed, the indenture of the fine, and an affidavit, that there was no such parish as *Corley*, the county where the lands lay.

The Court of Common Pleas will not, however, allow the number of acres inserted in a fine to be increased where the deed of uses is general, and the fine is levied by a husband and wife.

Thus on a motion to amend a fine, by increasing the number of acres, the deed of uses being general, and the intent only proved by affidavit, Lord Chief Justice *De Grey* observed, that amendments antiently were only of errors in the process of fines, or mistakes in the description of the premises; and these were amended by other parts of the same record: but the amendment then requested varied the extent of the premises from fifty to eighty-four acres. This, indeed, might be done upon principle, provided it was intended by the parties: but what was the evidence of that intent? the deed to lead the uses could not be legal evidence of the wife's intent, because she was not examined as to the deed; as she was to the fine, and so there was nothing to amend by.

Although the court of Common Pleas will amend a fine in matters of form, yet where a fine is recorded of one term, the court will not alter it, and make it a fine of another.

Heath
v. Sir J. E.
Wilmot,
2 Black.
Rep. 778.
Wilson on
Fines 58.

Thus where a fine was taken on the first of *October* 1770, 10 Geo. 3. and acknowledged before commissioners, in which Sir *John Eardly Wilmot*, (then Lord Chief Justice of the court of Common Pleas) and others were cognizors, which was passed, ingrossed, and recorded as a fine of the preceding *Trinity* term; Sir *John* had nothing in the lands, until a few days before he acknowledged the fine, and therefore in the deed to lead the uses thereof, it was covenanted by the parties, that the fine should be levied as of the *Michaelmas* term next ensuing the acknowledgment of the fine, but by mistake the fine was recorded as of the preceding *Trinity* term. Upon producing the deed to lead the uses of the fine, and shewing the mistake, it was moved that the fine might be altered, and made a fine of *Michaelmas* term, according to the covenant in the deed of uses; but Lord Chief Justice *De Grey*, and the whole court observed, that this was not a motion to amend a fine, but to make a new fine; for

Sir

Sir *John Eardly Wilmot* having nothing in the lands at the time when the fine was levied and recorded, it could only operate as a bar to himself and those claiming under him, so that the granting of this motion might prejudice the rights of strangers.

No change of the Christian names of parties to a fine is allowed by way of amendment.

Thus on a motion to alter the name of the demandant *Dixon* in a fine from *Robert* to *John*, on an affidavit by the attorney concerned, that *John Dixon* was the party meant who had purchased a part of the estate, and that no deed to declare the uses of the fine had been executed, the court refused the motion.

v. *Lawson*,
2 *Black.*
Rep. 816.

By the statute 23 *Eliz. c. 3. s. 10.* It is enacted, That no fine levied before that act, which shall be exemplified under the Great Seal, shall, after such exemplification, be in anywise amended. And by the statute 27 *Eliz. c. 9. s. 10.* no fine levied before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverford West*, or under the seal of any of the counties palatine, shall, after such exemplification, be in anywise amended.

CHAPTER IX.

*Of the Force and Effect of a Fine at Common Law,
and by the Statutes 18 Edw. 1. and 34 Edw. 3.*

*Force of a
Fine at Com-
mon Law.*

HAVING stated the various circumstances which are necessary to the levying a fine, we shall now proceed to investigate the effects with which it is attended.

Plowd. 357.

By the common law, all decisions of the king's courts were allowed the utmost force in ascertaining the rights of the contending parties: now a fine being considered as a composition of a suit actually commenced, and the concord of a fine coming in lieu of the sentence which would have been given, in case the parties had not agreed to terminate the suit in this manner, it was allowed to have the same force and effect as a judgment of a court of justice in a real action.

Cod. lib. 2.

Tit. 4. l. 20.

This idea seems also to have been adopted from the civil law; for it is said in *Justinian's code*, *Non minorem auctoritatem transactionum quam rerum judicatorum esse recta ratione placuit.* And the rule laid down by modern civilians is, *Transactio inter ipsos transigentes eandem vim habet quam res judicata, et propterea causa transactione decisa et finita, non magis quam sententia retractatur, nec aliqui nullus sit litium finis.*

Vin. de
Transact.
c. 8. n. 3.

The delivery of possession by the sheriff, after a fine was levied, in pursuance of the writ of *habere facias seisinam*, which issued for that purpose, being equal in point of notoriety to the ceremony of livery of seisin, it was therefore established, that a fine not only transferred the possession, but also the right of possession. It does however take away the right of entry of those who have a title to the land, unless where it is levied by a tenant in tail in possession, in which case it operates as a discontinuance of the estate tail; so that the remainder man or reversioner is barred of his entry, and has only a right of action left: for although the statute *De Donis* says, *Et si finis super hujusmodi tenementum in posterum levetur ipso jure sit nullus*, yet these words were only held to extend to the right

right of the issue in tail, and not to their possession. There are however several cases, in which a fine does not operate as a discontinuance of an estate tail, which will be taken notice of in a subsequent part of this work.

A final judgment in a writ of right, and a chirograph of a fine, were originally considered as perfect bars to all claims whatever from the moment they were completed. Thus *Madox* has transcribed a record of the 10 *Rich.* 1. Diff. p. 14, where *Roger de Wermedale* was impleaded for lands, of 15. which a fine had been levied: and it was adjudged that he should hold the lands in peace, and that none of the said persons could rightfully implead him, as they were in *patria* when the fine was levied, and made no claim: *Recordatum est per eosdem barones quod post finem et concordiam factam inter prædictos Matildam & Rogerum, &c. traxerunt prædictum Rogerum in placitum de tenemento quod annotatur in rotulo precedente. Et quod iudicium fuit, quod Rogerus teneat in pace tenementum prædictum, sicut continetur in cyrographo facto inter ipsum & prædictam Matildam, & quod nullus prædictorum poterit eum implacitare, ex quod ipsi fuerunt in patria quando finis ille factus fuit, & non posuerunt clameum aliquod in terra illa, sicut prædictus Rogerus contra eos dixit in curiâ regis in placito, & ipsi hoc non defenderunt.*

The effect of a judgment or fine continued to be the same when *Bracton* wrote; and he justifies it upon the principle, that sufficient time was given both in a real action, and the passing a *chirographum* for all those who had any right to make their claim. *Et sciendum quod statim in ipso placito & factione cyrographi, vel ante iudicium si presens fuerit in curia, vel si in patria vel in regno infra quatuor Maria, nec allegare poterit ignorantiam, nisi iustum intervenerit impedimentum, nec ulterius audiri debet (ut videtur) quia terminum habet ad minus unius mensis (secundum communem provisionem regni) infra quem venire potest commode post placitum motum quocumque fuerit in regno, infra quatuor Maria, quia quilibet implacitatus debet habere summonitionem 15 dierum ad minus, quæ rationabilis dici poterit summonitio, nec conceditur alicui cyrographum primo die litigii, sed habebit alium diem per spatium 15 dierum ad minus ad capiendum cyrographum suum, ut infra totum illud tempus possit qui jus habuerit apponere clameum suum.* Bracton 436. a. & b.

A considerable

A considerable alteration was however made in this respect some time between the reign of *Hen. 3.* and that of *Ed. 1.*; for, in the time of this latter prince, all persons were allowed a year and a day to claim against a judgment or fine.

Lib. 6. c. 53. Thus *Fleta* says, *Excipere enim poterit tenens ex taciturnitate petentis vel alicujus antecessoris sui, ut si subticuerint cum viderint de jure suo litigare, vel finalem concordiam facere & clameum suum infra annum & diem non apposuerint.* But if no claim was made within that period, it then became a perpetual bar to all persons whatever; so that a fine was a mode of acquiring lands, which, after a certain time, secured the title of the purchaser against every kind of claim.

² Inst. 713. The necessity of some assurance of this kind seems to
² Comm. 449. have been early felt; for it is a maxim of the highest antiquity in our law, that all sales of personal property in an open fair or market, are not only good and valid between the contracting parties, but are also binding on all strangers who have any right to the things thus sold: and Sir *Co. Read. 1.* *Edward Coke* and the author of *Doct. and Student* are of *Doct. & Stud.* opinion, that the validity of a sale in an open market, and *Dial. 1. c. 23.* its efficacy in binding the rights of strangers, was extended to a fine, for the security of those who were in possession of lands (a).

Of the Statute de modo levandi fines, 18 Edw. 1. The utility of fines, and the propriety of allowing them the utmost force in securing landed property, produced the stat. 18 *Edw. 1.* stat. 4. usually called the *statute de modo levandi fines*, which was made for the sole purpose of ascertaining the manner in which fines should in future be levied, and of declaring their effect.

This statute, after regulating the forms which were to be pursued in the passing of fines, proceeds thus: "And the cause wherefore such solemnity ought to be observed
 " in

(a) The law hath ordained the court of Common Pleas as a market overt for assurances of land by fine; so that he who will be assured of his land, not only against the seller, but all strangers, it is good for him to pass it in this market overt by fine, ³ Rep. 78. b. For as the common law hath provided a sure and safe way to acquire and get the property of goods by sale in market overt, so also the common law hath ordained a sure manner of conveyance for the purchaser of lands, which, as our statute saith, was by fine, *Co. Read. 1.*

“ in levying a fine is, because a fine is so high a bar,
 “ and of so great a force, and of so strong a nature in
 “ itself, that it concludeth not only such as are parties,
 “ and privies thereto, and their heirs, but all other per-
 “ sons in the world, being of full age, out of prison,
 “ good memory, and within the four seas, the day
 “ of the fine levied, if they make not their claim of their Black.
 “ action, within a year and a day, on the foot of the Rep. 994.
 “ fine.”

In the next year after this statute was made, there is a very strong instance of the same principle to be found in the rolls of parliament. The king having seized on the manor of *Sobbirs*, for his year, and day, and waste, on account of a felony committed by *Thomas de Weyland*, *Margery* the wife of the said *Thomas*, and *Richard* his son, petitioned the king to be immediately restored to the manor; because they had been enfeoffed jointly with the said *Thomas* for their lives, as well by a charter as by a fine levied in the king's court, which they produced; and as *Thomas de Weyland* was only seized for life, they contended that the king was not intitled to the year, day, and waste, nor the Lord of the fee to a forfeiture. This case was solemnly discussed in parliament, where it was determined, that, in consequence of the fine, the manor was forfeited; and in this judgment is the following remarkable passage: *Nec in regno isto provideatur, vel sit aliqua securitas, major seu solemnior, per quam aliquis vel aliquid statum certiores habere possit, vel ad statum suum verificandum aliquod solemnius testimonium producere, quam finem in curia Domini Regis levatum, qui quidem finis sic vocatur, eo quod finis & consummatio omnium placitorum esse debet, & hac de causa providebatur.* Rot. Parl. 19 Edw. 1. no. 1. vol. 1. p. 66. 2 Inst. 511.

The principles of natural justice require, that those who are disabled from pursuing their rights should not be bound by their nonclaim; and therefore all those who were under the age of twenty-one years, in prison, of non sane memory, or beyond the four seas, when a fine was levied, were excused from making their claim, both by the common law, and by this statute; and no particular time being prescribed to them for pursuing their rights, such persons as happened to labour under any of those disabilities when a fine was levied, were not obliged to make their claim within a year and a day after the removal. Braet. 436. b. 2 Inst. 516. Plowd. 360.

(val of their disabilities, but were allowed to prosecute their rights at any subsequent period.

By the old law, married women were not bound to
 Bra&t. 436. b. make any claim during their coverture, *item excusatur*
 1 Inst. 260. b. *uxor quæ sub potestate viri supposita quod clameum non appo-*
 Plowd. 360. *suerit licet mittere possit.* But no saving or exception was

made in this statute for married women, because their husbands were always supposed to be capable of claiming for them. However, if the husband were within age at the time when a fine was levied, although the wife was of full age, still the infancy of the husband, whose province it was to make the claim, saved the right of the wife for ever.

*Of the Statute
de finibus le-*

vatis,
 Co. Read. 14.
 2 Inst. 522.
 Plowd. 359.

In case of a recovery in a writ of right or fine executory, the recovery and fine must have been executed, and the possession delivered to the recoveror or cognizee, otherwise they were no bar whatever; because, until there was a transmutation of possession, strangers were not presumed to have any notice of the alteration of property, and therefore were not obliged to put in their claim.

Co. Read. 18.
 2 Inst. 522.
 1 Reeves 450.

This rule gave rise to a great number of suits, by the maintenance of the nobility and great barons during the insurrections and civil wars which happened in the reign of Hen. 3. Averments that there was no transmutation of possession were frequently made against fines, and were usually allowed in the two following cases: first, where a man seised in fee levied a fine to a stranger, *sur cognizance de droit come ceo, &c.* and the cognizee granted and rendered back the same lands to the cognizor in tail for life or for years; and, secondly, where tenant in tail accepted of a fine from a person who had nothing in the lands.

In these cases, the heirs of the cognizor, who were prejudiced by such fines, were allowed to avoid them, by an averment that there was no transmutation of possession. To remedy this inconvenience, a statute was made in the 27 Edw. 1. called the *statute de finibus levatis*, enacting, that such averments should not thenceforth be admitted.

This statute also directed, that the note of every fine should be read in the court of Common Pleas in two certain days in the week, and that during such reading all pleas should cease.

*Of the Statute
of Nonclaim.*

By the common law, and also by the statute *de modo levandi fines*, all those who had any right to lands, where-
 of

of a fine was levied, were obliged to make their claim within a year and a day, unless they laboured under some one of the disabilities specified in that act; and it was determined, that, in the case of tenant for life, remainder for life, remainder in fee, if the first tenant for life had aliened his estate, and the alienee had levied a fine, the remainder man for life might enter and avoid the fine, both as to himself and as to the remainder man in fee: but if the person next in remainder neglected to enter within the year and day, not only he, but also the remainder man in fee, were for ever barred, and a claim by the remainder man within the year and day would not have saved his right, by which means the estates of remainder men and reversioners were frequently barred by the neglect of the particular tenants.

This was certainly a very great grievance, and was so severely felt, that to remedy it, the statute of *nonclaim* 34 *Edw. 3. c. 16.* was passed, enacting, "That the plea of non-claim of fines, which from thenceforth should be levied, should not be taken nor holden for any bar in time to come."

This statute was made in consequence of a petition from the Commons, which is published in the rolls of parliament 17 *Edw. 3. No. 26.* *Item que noncleyne des fines levees sur le rendre en temps a venir ne barre nul homme de sa action.* To which the king answered, *Il plest au roi q' desore cest chose soit faite et q' estatut ent soit fait q' avus des grantz et autres de non conseil.* Rot. Parl. vol. 2. p. 142.

The efficacy of fines was entirely destroyed by this statute, and strangers were thereby allowed to claim lands at any indefinite period of time after a fine had been levied of them, which must have been productive of very great inconveniencies.

The statute of *nonclaim* is still in force with respect to fines which are levied without proclamations; and although such fines are no bar to the issue in tail, yet, when levied by a tenant in tail in possession, they operate as a discontinuance, and of course put the remainder men or reversioners to their *formedon*, which now, by the statute 21 *Jac. 1. c. 16.* must be brought within twenty years after the right accrues, unless the person who has the right labours under any of the disabilities specified in that statute.

CHAPTER X.

*Of the Force and Effect of Fines by the Statutes
1 Rich. 3. 4 Hen. 7. and 32 Hen. 8. in barring
Estates Tail.**Of the Stat.*

1 Rich. 3.

1 Blackst. 70.

2 Blackst.

267.

IT has been a constant remark of those who have had occasion to trace the history of our *English* jurisprudence, that whenever a material alteration was made in the common law, the inconveniencies arising from such change, have been much greater than those, which were intended to be remedied.

1 Inst. 518.

This observation was perhaps more fully exemplified by the consequences which attended the statute of *nonclaim*, than by any other innovation which has been attempted in the common law. On this subject it is difficult to add any thing to the force of Sir *Edward Coke's* expression, "great contention arose, and few men were sure of their possessions." And it is astonishing that the legislature should suffer a grievance which must have been so universally felt, to continue so long; for the common law respecting *nonclaim* was not revived until the first year of the reign of *Rich. 3.* who seems to have attempted to palliate his cruelties, and the usurpation of the crown, by the many excellent laws which he immediately enacted; one of those was the 1 *Rich. 3. c. 7.* by which the common law was restored, and the doctrine of *nonclaim* revived.

Bacon's Life
of Hen. 7.

p. 3.

Of the Stat.

4 Hen. 7.

c. 24.

This statute was soon followed by the 4 *Hen. 7. c. 24.* and as in this last statute all the clauses in the 1 *Rich. 3.* are copied almost *verbatim*, and some additional matters are subjoined; the statute 1 *Rich. 3.* is now become useless and obsolete, and the whole effect of fines depends almost entirely at this day on the 4 *Hen. 7.* for which reason it will be necessary to explain it at large.

This act after reciting the last clause in the statute *de finibus levatis*, proceeds thus,—“The king our sovereign
“lord considereth that fines ought to be of the greatest
“strength to avoid strifes and debates, and to be a final
“end and conclusion: and of such effect were taken
“afore

“ afore a statute made of *nonclaim*, and now is used the
 “ contrary, to the universal trouble of the king’s sub-
 “ jects; will therefore it be ordained, &c.”

The first section which directs the proclamations to be made, has been already stated.

Sec. 2. “ And the said proclamations so had and
 “ made the said fine to be a final end and conclude, as
 “ well privies as strangers to the same, except women
 “ covert, other than be parties to the said fine, and
 “ every person then being within the age of 21 years, in
 “ prison, or out of this realm, or not of whole mind at
 “ the time of the said fine levied, not parties to such
 “ fine.”

We have seen that by the common law, a fine levied of an estate tail, only operated as a discontinuance of it, and did not bar the issue from bringing their *formedon*. But in consequence of some ambiguous expressions in this statute, it was supposed to enable tenants in tail to bar their issue by a fine; estates tail however had continued so long, and were so much favoured by the nobility, on account of their not being forfeitable for treason, that the judges were extremely cautious of putting so extensive a construction on it, especially as the statute *de donis conditionalibus* expressly declares that a fine levied of an estate tail should be void.

A case however arose in 19 *Hen. 8.* in which this point came in question, some of the judges argued, that the issue was not barred by the fine of his ancestor, not being privy to him, but claiming the estate immediately from the donor, *per formam doni*: but the majority of the judges were of opinion, that a fine levied by a tenant in tail, according to the statute 4 *Hen. 7.* was a good bar to his issue (a)

This determination of the judges seems not to have been entirely approved of; for in 32 *Hen. 8.* a statute was passed, reciting that doubts had arisen respecting the validity of the statute 4 *Hen. 7.* in barring the issue in tail, and enacting, “ That all and singular fines, as

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“ well

(a) This subject is discussed in so extensive and masterly a manner by Mr. *Hargrave*, in one of his notes to the first Institute, that nothing can be added to it; and it now being a matter of curiosity only, it is thought sufficient to refer the reader to that excellent work. 1 Inst. 221. a. last edit. note 1.

“ well heretofore levied, as hereafter to be levied, with
 “ proclamations according to the statute, by any person
 “ or persons of full age of one and twenty years, of any
 “ manors, &c. before the time of the said fine levied, in
 “ any wise intailed to the person or persons so levying
 “ the said fine, or to any of the ancestors of the same
 “ person or persons in possession, reversion, remainder,
 “ or in use, shall be, immediately after the same fine
 “ levied, ingrossed, and proclamations made, adjudged,
 “ accepted, deemed and taken, to all intents and purpo-
 “ ses, a sufficient bar and discharge for ever against the
 “ said person and persons, and their heirs, claiming the
 “ said lands, tenements, and hereditaments, or any par-
 “ cel thereof, only by force of such intail, and against
 “ all other persons claiming the same or any parcel
 “ thereof, only to their use, or to the use of any manner
 “ of heir of the bodies of them, any ambiguity, doubt,
 “ or contrariety of opinion risen or grown upon the said
 “ statute to the contrary notwithstanding.”

*Operation of
 these Statutes
 in barring
 Estates Tail,*
 Hob. 332.

8 Rep. 87. b.

2 Inst. 271. a.

8 Rep. 42. b.

2 Inst. 516.

Shep. Tou.
 20.

The statute 32 Hen. 8. having been professedly made for the purpose of explaining the statute 4 Hen. 7. they ought to be considered together.

The term by which the issue in tail is described in the statute 4 Hen. 7. is that of privy, which has various significations in our law: it sometimes means that connection which arises between persons, who have entered into a mutual contract with each other, as between donor and donee, lessor and lessee; or else it signifies a relationship of blood, as between ancestor and heir, but in consequence of the statute 32 Hen. 8. which has been considered as an explanation of the statute 4 Hen. 7. It has been determined, that by the word privy are meant, those persons who are not only privy in blood to the person who levies the fine, but also privy in estate and title to the land whereof the fine is levied; that is, those who must necessarily mention the cognizor, and convey their descent through him, before they can make out their title to the estate, which comprehends the issue in tail: and a person who is a privy within the intention of the 4 Hen. 7. is an heir in tail within the intention of the 32 Hen. 8. *et sic e converso.*

Thus if a tenant in tail in possession, levies a fine with proclamations, it will be an effectual bar to all his issue, for

for they are privy to him both in blood and estate, and can only make a title to the estate tail as his sons.

So where a husband and wife were tenants in special tail, and the husband alone levied a fine; it was determined in 18 *Eliz.* and also in 10 *Jac.* that it was a good bar to all their issue, because in making out their title they must necessarily shew themselves to be heirs to the father, as well as to the mother, and therefore they are privies both in blood and estate to the cognizor of the fine. Dyer 351. b. pl. 24. Beaumont's case, 9 Rep. 138.

Sir *Edward Coke* says, that if lands were given to an elder son and the heirs of his body, remainder to his father and the heirs of his body, and after the father's death, the eldest son had levied a fine with proclamations, and died without issue; the second son would have been barred by the fine, because the remainder which was limited to the father and the heirs of his body, having descended on the eldest son, the second son in making out his title to this remainder, must convey his descent through his elder brother, by which means he would become a privy to him, both in blood and estate. 1 Inst. 372. a. Vide Dal. 2 Eliz. and 7 Eliz.

The privy must be both in blood and estate, for privy in blood only will not be sufficient.

Thus if lands be given to a man and the heirs females of his body, who has a son and daughter, and the son levies a fine and dies without issue, it will be no bar to the daughter; for although she is privy in blood to her brother, yet she is not privy in estate or title to him, as she can make her title to the estate without conveying her descent through him, or even mentioning him. Shep. Tou. 20.

It follows from the same principle that if a tenant in tail has issue a daughter who levies a fine, and afterwards a son is born, he will not be barred by his sister's fine, because he can make his title to the estate tail as heir of the body of his father, without conveying his descent through his sister. Hobart 333.

Where a person makes mention of any of his ancestors, in the course of his pedigree only, and not as one from whom he claims, he is not considered as privy in estate and title to such ancestor, and therefore will not be barred by his fine.

Thus where *William Rogers* an idiot, being seised of a reversion in fee, *Andrew Rogers* his uncle, levied a fine Edwards v. Rogers, Cro. of Car. 524, 543.

1 Vent. 418. of the lands with proclamations to a stranger, and died
 Sir W. Jones in the lifetime of his nephew : upon the death of the idiot
 456. without issue, the grandson of *Andrew Rogers* entered
 and claimed the lands as heir at law to the idiot, and the
 question was, whether he was barred by the fine of his
 grandfather. *Croke* and *Berkeley* were of opinion, that
 as the lands never descended on *Andrew Rogers*, his grand-
 son was not barred by his fine, for he claimed nothing
 from him, but only mentioned him in the course of his
 pedigree.

It is not necessary that a tenant in tail should be in the
 actual possession of the estate tail, in order to be capable
 of barring his issue by fine ; for the statute 4 *Hen. 7. f. 7.*
 has expressly excluded parties and privies to a fine from
 pleading *quod partes finis nihil habuerunt*, and the statute
 32 *Hen. 8.* makes a fine levied of any lands intailed to
 the person so levying the same, or to any of his ancestors,
 a sufficient bar against such person and his heirs. So that
 a fine with proclamations duly levied by a person who
 has the right of an intail in him, will be a good bar to his
 issue, although at the time when the fine was levied, he
 had never entered on the estate tail, or had only an es-
 tate tail in remainder, or had even a scoffment or any
 other conveyance of it.

Thus where *Edward* Lord *Zouch* brought a *formedon* in
 the descender for a moiety of a manor against one *Bam-*
field, who pleaded in bar that *John*, great grandfa-
 ther of the demandant, levied a fine *sur cognizance de droit*
come ceo with proclamations of the said moiety, which was
 granted, and rendered by the same fine to the said *John*
 and his heirs, whose estates the tenant had ; Lord *Zouch*
 replied, that at the time when the fine was levied, and
 at all times after, the said *Bamfield* was seised of the land
 in his demesne as of fee. And on solemn argument it
 was determined by all the judges, that the demandant
 being heir in tail to the person who levied the fine, could
 not aver the continuance of the land in a stranger, nor
 aver *quod partes finis nihil habuerunt*, because the statutes
 4 *Hen. 7.* and 32 *Hen. 8.* bound the estates tail, although
 the person who levied the fine was not then in possession
 of the estate tail, which Sir *Edward Coke* observes, was
 the first determination on this point.

A fine

cap
ffine
 Zouch v.
 Bamfield,
 3 Rep. 88.
 1 Leon. 75.

A fine levied by a tenant in tail in remainder, expectant on an estate for life, or an estate tail, will be a good bar to the issue of the person who levies the fine. Jenk. Cent. 6. Case 96.

Thus *A.* being a tenant for life, remainder to *B.* in tail, reversion to *B.* and his heirs. *B.* levied a fine with proclamations of the estate tail, during the life of the tenant for life; and it was adjudged to be a good bar to the estate tail. Case of Fines, 3 Rep. 84. Smith v. Stapleton, Plowd. 430. S. P.

If a tenant in tail makes a feoffment of the estate tail and afterwards levies a fine of it, his issue will be thereby barred. 3 Rep. 90. a.

The grandfather being tenant in tail, enfeoffed the father in fee; afterwards the grandfather disseised the father, and levied a fine, with proclamations; the father entered, and the cognizee of the fine entered on him: after the death of the father, his son brought a *formedon* for the recovery of the land, to which this fine was pleaded in bar; the demandant pleaded the entry of his father, and judgment was given for him. A writ of error was brought, and error was assigned in matter of law, that this fine was a good bar to the issue in tail by the statute 32 Hen. 8. for it was not to be compared to a fine at common law, nor to fines levied by other persons, because in this case it was sufficient that the fine was levied by the person who had the right of the estate tail in him, or to whom the land was intailed, although none of the parties to the fine had any estate of freehold in possession, remainder, or reversion, in the land whereof it was levied, as it was adjudged in the case of *Zouch v. Bamfield*. Hunt v. King, Cro. Eliz. 610. Ante p. 86. The court was of this opinion, and the judgment was reversed.

Although a tenant in tail is disseised, yet if during the disseisin he levies a fine to a stranger, it will bar his issue, who will not be allowed to plead, that his ancestor was not seised of the estate tail when he levied the fine. 3 Rep. 90. a. Jenk. Cent. 265.

If a tenant in tail covenants to stand seised to the use of himself for life, remainder to his son, and afterwards levies a fine to other uses it will be good, and the last uses will take place. Bedingfield's Case, Cro. Eliz. 895. Noy 46.

In case of a lineal descent, the issue in tail may be barred by the fine of his ancestor, although at the time of levying the fine the ancestor had only a possibility of an estate tail which never took effect, because the issue in making

making his title, must convey his descent through such ancestor, which makes him a privy to him.

Archer's Case
cited, 3 Rep.
90. a.
Hobb. 333.

Thus where lands were given to *A.* and his wife in special tail, *A.* died leaving issue a son who disseised his mother, and levied a fine with proclamations. It was resolved by all the judges that this fine was a good bar to the issue of the son, although the son at the time when he levied the fine had only a possibility of an estate tail, his mother being then alive; for the statute 32 *Hen.* 8. ought to be expounded according to the letter of it, and as the land was intailed to the ancestor of the person who levied the fine, although such ancestor was alive, so that no estate or right had descended on the person who levied the fine which he could pass or extinguish, yet as the statute says—"intailed to the person so levying the same or to any of his ancestors," in the disjunctive, it was adjudged that the fine did bar the right which afterwards descended to him, not only as to himself, but also to all his issue.

This principle was carried much farther in the following case:

Grant's Case
cited,
10 Rep. 50. a.

William Grant devised his lands to *John Grant* when he should attain the age of twenty-five years, to hold to him and the heirs of his body. *John Grant*, the devisee, after he had attained the age of twenty-one years, but, before he was twenty-five, levied a fine of the lands thus devised; and the question was, whether it should bar his issue. It was resolved that the estate tail was barred by this fine, although *John Grant* when he levied it had but a bare possibility of an estate tail. Sir *Edward Coke* says that no judgment was given: but *Croke* and *Leonard*, who have reported this case by the name of *Johnson* and *Bellamy*, say judgment was given, that the estate tail was barred by the fine. And in Sir *Thomas Raymond's* Reports, it is said, that although the estate was not barred by the 4 *Hen.* 7. it was well barred by the 32 *Hen.* 8. in consequence of the words "all fines, levied by any person or persons, &c. of any manors, &c. before the time of the said fine levied in anywise, entailed to the person or persons so levying the same fine, or to any of the ancestors of the same person or persons."

Cre. Eliz.
122.
2 Leon. 36.

In case of a collateral descent, a fine levied by a person who was never seised of the estate tail, and on whom it

it never descended, but who had only a possibility of an estate tail, is no bar to a collateral heir in tail, of the person who levied the fine; because, in making his title to the estate tail, he need not convey himself through him, so that he is not a privy to him.

A husband made a feoffment to the use of himself and his wife, and the heirs-male of their two bodies, remainder to the heirs-male of the body of the husband, remainder to the heirs of their two bodies, remainder in fee to the husband. The husband and wife had issue a son and a daughter, the husband died, the son made a lease to commence after the death of his mother, then levied a fine with proclamations to the use of himself in fee, and died without issue in the life-time of his mother. The question was, whether this lease was good against the daughter. It should previously be observed, that the estate-tail limited to the husband and wife, and the heirs-male of their bodies vested wholly in the wife after the death of her husband, although she was within the statute 11 Hen. 7. c. 20. and the remainder to the heirs-male of the body of the father was in the son at the time when he levied the fine; but these estates became extinct when the mother and son died, so that the lease in question could only be derived out of the remainder to the heirs of the bodies of the husband and wife, to which both the son and the daughter were inheritable. It was determined by Lord Chief Justice *Hobart*, *Hutton* and *Jones*, against the opinion of *Winch*, that although in a lineal descent the issue in tail were barred by the fine of their ancestor, notwithstanding such ancestor had but a possibility of an estate-tail when he levied the fine; yet in a collateral descent the case was very different, as it was not necessary that the issue in tail should make mention of every collateral issue inheritable before him, as in a lineal one, and that in the present case as the estate-tail never descended on the son, his fine could be no bar to his sister, who was not privy to him, because she could make her title to the estate-tail without conveying her descent through him, or even mentioning him in her pedigree. Judgment was therefore given that the lease was void as to the sister, but it was observed that if the estate-tail had descended on the son, his fine would then have barred his sister, because in that case she must have conveyed

Mackwiliam's case, Hob. 332. Sir W. Jones, 31. S. C. by the name of Godfrey v. Wade.

Ante p. 63.

conveyed her descent through him, in order to make out her title to the estate-tail, by which means she would have been a privy to him.

Bradstock v.
Scovell,
Cro. Car.
434.

So where an eldest son levied a fine of an estate-tail, which was then vested in his mother, and died in the life-time of his mother, by which means the estate-tail never descended on him. It was adjudged in the Common Pleas, by three judges against one, that this fine did not bar the second brother. And upon a writ of Error all the judges of the King's Bench were of the same opinion, because as the estate-tail never vested in the elder brother, the younger brother was not privy to him.

A tenant in tail of a rent-charge may bar it, by levying a fine of the lands out of which the rent issues.

Hellot v.
Saunders,
Cro. Jac. 669.

Thus, where a tenant in tail of a rent-charge issuing out of the manor of *Kingsbury*, levied a fine of the manor, which was pleaded in bar of an avowry made for the rent. The fine was levied of the rent *per nomen manerii*, and an averment was made that the fine was levied by agreement of the parties with an intent to bar the rent. The defendant pleaded, not comprized, which being demurred to and argued several times, it was held by Lord Chief Justice *Hobart* and *Harvey*, that the rent was barred by the fine, because the fine being levied of the land, passed the rent inclusively, it being directed by the agreement of the parties.

Vide notes
to Plowden
last edit.
P. 435.

Plowd. 435.
Dod. Comp.
Parson. 63.
Watf. Comp.
Incumb. 84.

As a fine may be levied of an advowson in gross, so a tenant in tail of an advowson in gross, so a tenant in tail of an advowson in gross may bar his issue by a fine levied of it according to the statute, 4 *Hen. 7.* It is however said in *Plowden*, that if a tenant in tail of an advowson grants or renders to another by fine the nomination of a clerk to the advowson, this will not bind the issue, because the right of nomination is a thing distinct from the advowson, and not intailed; but modern writers have thought differently on this subject, on the principle that the presentation and nomination are in effect the same thing, being the fruit and full profit of the patronage. But if a tenant in tail of an advowson grants by fine the nomination of a clerk to one and his heirs, so that when the church becomes void the grantee and his heirs may nominate a clerk to the tenant in tail and his heirs, and that he or they shall present the clerk so nominated to the ordinary;

ordinary; such fine will not bind the issue in tail, because there the nomination and presentation are distinguished, so that the fine is not levied of the thing intailed.

A *cestui que trust*, in tail may levy a fine of such an estate, which will have as extensive an operation in barring his issue, as if he had the legal estate. *Vide infra* ch. 11.

If a fine be levied by a stranger to a tenant in tail, and the tenant in tail grants and renders his estate to the stranger, such a fine will bar the issue in tail.

Thus where a stranger levied a fine to a tenant in tail in remainder, who granted and rendered the lands to the cognizor for fifty-one years. It was resolved that this term was good against the issue in tail. *Smith v. Stapleton, Plowd. 430.*

As tenant in tail may convey his whole estate by fine, so he may create any lesser estate out of it, which will likewise bind his issue after his death. Thus in the preceding case a term for years created by a tenant in tail was held to be good against the issue. *Vide Mac-William's case, ante p. 89.*

If the issue in tail levies a fine in the life-time of his ancestor, who is then seised of the estate-tail, the ancestor may afterwards levy a fine himself, and thereby bar his issue, and also the person to whom the issue levied the fine. So that in all cases of this kind, it is understood that the tenant in tail dies without barring the estate tail, by which means it descends upon the issue. *Jenk. Cent. 275. Shep. Tou. 25.*

If there be tenant in tail, with remainder to himself in tail, he may by levying one fine bar both the estates tail. *Shep. Tou. 26.*

A tenant in tail being guilty of murder, levied a fine before conviction, and it was doubted whether it should bar the issue for the lord's benefit. The court inclined to think that it should, but no judgment was given. *Willson's Rep. p. 2. 220.*

Where the king is tenant in tail he may by a fine levied on a grant and render, bar his estate-tail, because it being determined in Lord *Berkeley's* case, that the king was bound by the statute *de donis*, it was but reasonable his majesty should take advantage of those statutes, which enable tenants in tail to bar their estates. *7 Rep. 32. a. Plowd. 227.*

A fine *sur concessit*, will bar an estate-tail as long as it continues in force, and therefore any estate created by a fine of that kind will be good against the issue in tail. *Earl of Rutland's case, Cro. Jac. 40. Jenk. Cent. 321.*

Although a fine levied by a tenant in tail may be defeated by a person claiming some particular estate in the lands

lands of which the fine is levied, yet it will still continue to be a good bar to the issue in tail.

1 And. 43.

3 Rep. 91. a.

Thus where a tenant in tail discontinued in fee, afterwards disseised the discontinuance, and levied a fine with proclamations; the discontinuance entered on the land, and avoided the estate, which passed by the fine as to himself. The question was, whether the heir in tail was remitted or not, and the judges were unanimous, that the heir in tail was not remitted, but was barred by the statute, 32 Hen. 8. although the estate which passed by the fine was avoided.—The same point was determined in the case of *Hunt v. King*, which was stated in the preceding part of this chapter.

Ante p. 87.

Although no fine is a bar to an estate-tail, but a fine with proclamations levied, pursuant to the statute, 4 Hen. 7. yet as soon as a fine is levied, and before all the proclamations are past, it is a good bar to an estate-tail, provided the proclamations are duly made, and the issue in tail cannot save his right by entering before all the proclamations are made.

Plowd. 434.

This point was formerly much doubted, and in the case of *Smith and Stapleton*, 15 Eliz. it was contended by the counsel, that in consequence of the words in the statute, 4 Hen. 7. "and the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers," &c. And also the words in the statute 32 Hen. 8. "After the same fine levied, ingrossed, and proclamations made," &c. a fine was no bar to the issue in tail, if the ancestor died before all the proclamations were made: and *Brooke* seems to have been of the same opinion; the contrary, however, was determined in the following case:

Bro. Ab. Tit.
Fine 109.

Purflow's
Case cited,

3 Rep. 90. b.

Sir George Blunt being in tenant tail of several manors, and having issue, a daughter; levied a fine, and soon afterwards died. The daughter immediately brought a *formedon* for the recovery of the estate tail, pending which all the proclamations were made. It was unanimously determined that the daughter was barred by this fine, although her ancestor died, and she commenced her action before the proclamations were all made. *Sir Edward Coke* makes four observations on this case.

1. That although, after a fine is levied, a right to an estate tail descends to the issue, yet, as soon as the proclamations

clamations are made, the right which thus descended is barred by the fine.

2. Although a formedon is brought and pursued, yet, if the proclamations are all afterwards duly made, the fine will then be a good bar.

3. When tenant in tail levies a fine, and dies before all the proclamations are made, the issue in tail is not within any of the savings of the 4 *Hen. 7.*; for, if he were, then the bringing his formedon before all the proclamations were made, would avoid the fine.

4. That the proclamations serve no other purpose but that of distinguishing a fine levied, pursuant to the statute 4 *Hen. 7.* from a fine at common law.

So where a tenant in tail levied a fine, and died before all the proclamations were made, leaving a son, who was beyond sea, who returned after all the proclamations were made, and claimed the land. It was resolved by all the judges, that although a right of entail descended to the son on the death of his father, in consequence of his dying before all the proclamations were made; yet, when all the proclamations passed, the right which descended to him was for ever barred, and the issue could not have saved it by any claim. Case of Fines,
3 Rep. 84.

We have seen that fines may be levied in the courts of ancient demesne, and other inferior courts; but they have only the operation of fines at common law; they therefore create a discontinuance when levied of an estate tail, but do not bar the issue from bringing a formedon: for no fine, unless it is levied with proclamations, pursuant to the statute 4 *Hen. 7.* has the effect of barring an estate tail, without a particular custom. Salk. 340.
Dyer 370.
pl. 13.

There is one species of estate tail which is protected from the operation of the statutes 4 *Hen. 7.* and 32 *Hen. 8.* by two positive statutes; that is, an estate tail given or procured to be given by the Crown as a reward of services; where the remainder or reversion is vested in the Crown, of which notice will be taken in a subsequent chapter.

The privilege of levying a fine pursuant to these statutes, is an incident so inseparably annexed to an estate tail, that any condition or proviso, restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void: but a tenant in tail may be restrained 1 Rep. 83.
10 Rep. 37.
1 Inst. 224.
1 Vent. 321.
2 Vern. 233.

restrained from levying a fine at common law, because that is a tortious act, and only operates as a discontinuance to the issue.

Before we quit this subject, it may be proper to observe, that the operation of a fine is merely to bar the estate tail, but not the remainders or reversion which depend upon it; for a fine levied by a tenant in tail in possession only discontinues the estate tail, and gives the cognizee a base fee, that is, an estate to him and his heirs, as long as the tenant in tail has heirs of his body, but does not bar the rights of the persons in remainder and reversion.

- 1 Show. 370.
- 2 Salk. 338.
- 4 Mod. 1.

But where the tenant in tail has the immediate reversion in fee in himself, he may make a good title by fine only; for in that case the operation of the fine will be to merge the estate tail, and bring the reversion in fee into immediate possession, it being determined that a fine takes away the protection given to estates tail by the statute *de donis*; and they then, like all other particular estates, become subject to merger and extinguishment, when united with the absolute fee.

Chancery

f. 3 & 4.

This method, however, of barring an estate tail is attended with one considerable inconvenience, which will be mentioned in a subsequent chapter.

There are two clauses in the statute 32 Hen. 8. c. 36. by which it is enacted, That it shall not extend to any fine levied of any lordships, manors, &c. the owners whereof, by any express words contained in any special act of parliament made since the 4 Hen. 7. are restrained from alienation; nor to any manors, lands, tenements, &c. then in suit, demand or variance in any of the king's courts, or whereof any charters, evidences, or muniments, were then in demand in the court of Chancery, &c. but all such fines should have the same force and effect as if that statute had not been made.

CHAPTER XI.

Of the Force and Effect of a Fine, in barring particular Persons, Estates, and Interests.

THE object of the statute 4 *Hen. 7.* was not confined to the enabling tenants in tail to bar their issue, it was also intended to secure those who were in possession of land against all dormant claims; the words of the statute being so extensive, that they comprehend almost all persons, and almost every kind of estate or interest in lands: and where a fine and non-claim is pleaded, a court of law will not enter into any discussion of the title until that be accounted for.

Lay corporations, who have an absolute estate in their possessions, and a power of alienation, may be barred by a fine and non-claim.

Thus where the cooks of *London*, who were incorporated by *Edw. 4.* bargained and sold a part of their lands in fee; the bargainee entered and levied a fine with proclamations, and five years passed. Afterwards the bargain and sale proved to be void, on account of a misnomer in the corporation; and it became a question, whether the corporation was bound by the fine and non-claim. It was determined that the corporation was barred by the fine, because the statute 4 *Hen. 7.* was made for the public good, and to settle and quiet men's inheritances: that therefore the words of it ought to be construed in the most extensive sense, for the benefit of those who were in possession of lands, and for barring the rights of all persons who were remiss in making their claims: so that although the words of the statute only extended to natural persons and their heirs, and no mention was made of any corporation or successors, yet it was the intention of the legislature, that it should extend to such corporations as had in themselves an absolute estate and power of alienation.

Ecclesiastical corporations, however, are not barred by a fine and non-claim, as will be shewn hereafter.

By

Driver v. Lawrence,
2 *Black.*

Rep. 1259.
Lay Corporations.

Croft v. How-ell, Plowd.
536.

Infra, ch. 13.

Married Women.

By the common law, a married woman could not, by joining with her husband in any deed or conveyance whatever, bar herself, or those claiming under her, of any estate, whereof she was seised in her own right, or of that portion of her husband's real property, which the law has provided for her support, in case she survives him (a).

1 Comm. 442.

This rule probably arose from the principle of law, that the legal existence of a woman is suspended during the marriage, or, at least, is incorporated or consolidated into that of her husband; or else from a fear that the husband should use any compulsion, for the purpose of forcing his wife to part with her rights in his favour.

But although a married woman was never bound by any deed or conveyance executed by her during the coverture, yet if an action was brought against a husband and a wife for the recovery of any lands, whether the property of the husband or of the wife, and judgment was given against them, the wife was barred.

2 Inst. 342.

1 Reeves 427.

9 Vin. Ab.

p. 244.

Thus it appears, that until the statute of *Westminster* 2. even a judgment by default in a possessory action against a husband and wife, for the wife's freehold, was so far binding on her, that, after her husband's death, she could only recover her estate, by bringing a writ of right. Now a fine being an accommodation of a suit, and a concord being deemed to have the same force and effect as a judgment in a real action, it follows that a married woman must have been as effectually bound by a fine as by a judgment in an adversary suit. Nor was it thought necessary to give the wife a power of claiming lands, whereof she and her husband had levied a fine; because in that case she must have assented to it; whereas the husband might put in a feint plea, or let judgment go against him by default, without the consent or even the knowledge of his wife.

1 Inst. 121. a.

Note 1.

Mr. *Hargrave*, to whose learned note on fines I am indebted for the preceding observations, has very properly suggested,

(a) There are two instances in *Madox Formulæ Anglicanæ*, No. 148, & 319. of feoffments, which are expressed to be made with the assent of the feoffor's wife. And Mr. *Reeves* (hist. of the *English law*, v. 1. 65,) supposes, that the wife's claim of dower might, in those days, be barred by such assent, because feoffments were then made publicly in court.

suggested, that the common notion of a fine's owing its effect in barring married women, to their secret examination by the judges or commissioners, is incorrect. This remark is fully confirmed by a passage in *Glanville*, from which it appears that a married woman might appoint her husband as her attorney to levy a fine for her (a), in which case it is highly improbable that she should have been examined: and from which it may be concluded, that the private examination of a married woman was not a necessary circumstance at common law, and was possibly first prescribed by the statute *de modo levandi fines*.

If a fine derived its efficacy in barring married women, from the circumstance of their private examination, then that form might easily have been added to any other conveyance; but, by the common law, a bargain and sale by a husband, on which the wife is privately examined, does not bind her after the coverture is determined.

² Inst. 675.

Keilw. 4. a.

It is however observable, that, by the custom of *London*, and several other cities, a married woman may bar herself by a deed inrolled, on which she is privately examined; and this custom was confirmed in the reign of *Hen. 8.* by a positive statute.

² Bohun's Pri.

² Lond.

² Bro. Ab. Tit.

² Custom,

² pl. 39.

² Idem Tit.

But whatever were the principles upon which this doctrine was originally founded, it is now fully settled, that a married woman, by joining her husband in levying a fine, may bar herself and her heirs of all her estate and interest in any lands, whereof her husband is seised in her right. And where a fine is levied by a husband and wife, of lands which are the property of the wife, the whole estate passes from the wife, and the cognizee is in by her only: so that if the fine is afterwards reversed, the whole estate becomes again vested in the wife (b).

² Fait. Inroll.

² pl. 15.

² 34 35 Hen. 8.

² c. 22.

² Reb. 57. b.

² Id. 77. b.

H

Where

" (a) *Potest autem pater ita loco suo filium pro se ponere, et vice versa, extraneus quoque extraneum, uxor quoque maritum, cum quis itaque maritus positus loco uxoris sue in placito de maritagio, vel de dote ipsius uxoris aliquid amiserit, vel remisit de jure ipsius uxoris per judicium sive per concordiam.*" &c. *Glanville*, lib. 2. c. 3. Vide also an antient record, ante, p. 59.

(a) It is said, *arguendo*, in *Mr. Douglas's Reports*, 40. "That a husband is only named in a fine of his wife's estate for conformity; for the fine is considered as the act of the wife, not of the husband, and the cognizee is in by her only, in so much, that if a wife levies a fine without the concurrence of her husband, and he does not enter during the coverture, it will bar her after his death."

Roll. Ab.
Tit. Fine.
(O. 3.)

Anon.
1 Leon, 285.

Where a fine is levied by a husband and wife, of lands which are the estate of the wife, the warranty should be from the husband and wife, and the heirs of the wife.

A husband and wife joined in exchanging lands, which were the estate of the wife, with a stranger for other lands, and the exchange was executed. The husband and wife aliened the lands taken in exchange, and levied a fine of them to the alienee. It was adjudged that the wife might enter on her own lands after the death of her husband, and that her joining in a fine of the lands taken in exchange did not bar her from electing, whether she should claim her own lands, or those taken in exchange.

A married woman may bind herself by a warranty in a fine *sur concessit*, and an action of covenant will lie against her upon such a warranty.

Wotton v.
Hale,
1 Mod. 290.
2 Saund.
180.

Thus, where a husband and wife levied a fine *sur concessit* to A. for 99 years, if he should so long live, with a general warranty against all persons during the said term; the husband died, and it was determined that an action of covenant would lie against the wife upon the warranty.

Reason v.
Sacheverell,
1 Vern. 41.

As a married woman may by joining her husband in a fine make an absolute alienation of her estate, so she may also make a conditional one; and therefore if she and her husband mortgage her estate in this manner, it will bind her and her heirs.

Glanv. lib.
11. c. 3.
10 Rep. 49.
b.

It was formerly held that a married woman did not bar herself of her right to dower, by joining her husband in a fine; because until the death of the husband the wife had no right of action; but the law is now entirely altered in this respect, as it has been long established, that if a husband and wife join in levying a fine of the husband's estate, the wife is thereby barred from claiming her dower out of the lands which are comprised in the fine, because she having nothing in those lands in her own right, her joining her husband in a fine of them, could be for no other purpose than that of barring her from claiming dower; but a fine levied by the husband alone does not bar his wife of dower.

1 Inst. 36. b.
Dyer 358. a.

A woman may also bar herself of her jointure, by joining her husband in levying a fine of it, provided it be made pursuant to the statute 27 Hen. 8. and be a good bar of dower; because the wife by accepting such a jointure

ture before marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death but her jointure, which she herself concurred in destroying by the fine. But if a jointure be settled on a woman after marriage (in which case it is no bar of dower) and she joins her husband in levying a fine of it, this will not prevent her from claiming dower out of any other lands whereof her husband was seised during the coverture, because the jointure being no bar of dower, the wife had her election on her husband's death either to accept of the jointure, or to claim her dower; and therefore Sir Edward Coke says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

Notwithstanding these determinations, if it appears not to have been the intention of a husband and wife in levying a fine to bar the wife's jointure, it will not affect it in a court of equity.

Thus where *A.* upon his marriage in consideration of 500*l.* portion, settled an annuity of 50*l.* on his wife to be issuing out of particular lands; and afterwards *A.* and his wife joined in levying a fine of those lands to a mortgagee, who had notice of the annuity, which was excepted in the mortgage. It was contended that the wife had by this means extinguished her right to the annuity. But it appearing that it was not the intention of the parties to destroy this annuity, the court decreed that it should not be affected by the fine.

So where a jointure was settled on a woman issuing out of some houses in *London* which were burnt down, the woman joined her husband in a fine of the houses, to create a long term for raising money to rebuild them; and it was agreed that the woman should have her jointure out of the reserved rent of the houses; adjudged that the fine did not affect this jointure.

However, where a married woman joins her husband in a fine, it will not only bar her from claiming dower out of the lands comprised in the fine, but will also bar her of any particular interest in those lands.

Thus, where a man on his marriage entered into a bond for 600*l.* to a trustee with a warrant of attorney to confess judgment thereon, to be defeazanced on the payment of 300*l.* to his wife if she should survive him: the wife

H 2

afterwards 18,

1 Inst. 36. b.

1 Bulst. 173.

1 Leon. 285.

Dyer 558.

pl. 49.

Solly v.

Whitfield,

Rep. Temp.

Finch, 277.

S. P. Naylor

v. Baldwin,

Rep. in Cha.

8vo. v. 1. 131.

Anonymous,

the Skinner 238.

Brind v.

Brind,

1 Vern. 213.

Goodrick v.

Shotbolt,

Prec. in Cha.

333.

Gilb. Rep,

afterwards joined her husband in a fine of all his lands. It was agreed that the fine not only barred the wife from claiming dower out of the lands, but also destroyed her interest in the judgment.

Every kind of fine with or without proclamations, and whether levied in the court of Common Pleas, or in an inferior court will bar a married woman: for fines derive this effect from the principles of the common law, and not from any statute.

Trust Estates
Clifford v.
Ashley,
1 Cha. Ca.
268.
Salisbury v.
Bagot, Id. 278.
1 Freem. 311.

A fine is a good bar to a trust estate, as well as to a legal estate, because the *cestui que trust* has an equitable interest, and is therefore bound to pursue the proper remedies for securing it: and if this were not the case, the operation of a fine would be much less extensive, than it is, as there are so many trust estates now always existing.

Thus, if *A.* is seised of lands in trust for *B.* and *C.* enters on these lands and levies a fine of them with proclamations; if five years pass without any claim being made, this fine will be a good bar both to *A.* who had the legal estate, and to *B.* who was the *cestui que trust*.

But with respect to equitable titles there is a distinction; for where the equity charges the lands only, a fine and non-claim is a good bar, but where it charges the person, only in respect of the land, it is then no bar.

Gilb. Cha.
62.

Thus, if a trustee levies a fine of the lands whereof he is seised in trust, to a person who has notice of the trust, or if a man purchases from a trustee, with notice, and levies a fine, the *cestui que trust* will not be barred by such a fine, because the fine being levied to a person or by a person who has notice of the trust, the land will continue subject to the trust, and therefore the court of Chancery will not permit the fine to be a bar; so that whenever a person is charged as claiming under a trustee, he must either set up an opposite title, and deny his claiming under the trustee, or else, if he does claim under a trustee, he must set forth that he paid a valuable consideration for the lands, and deny that he had any notice of the trust.

2 Atk. 631.

If the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee

trustee for the person who had the right, because (as Lord *Hardwicke* observes) this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine's being levied.

It should however be observed, that where a fine is levied by a trustee or a person who has notice of a trust, it is not void, nor is it set aside, but the person to whom the fine was levied without consideration, or with notice, becomes himself a trustee for the real owner.

Having examined in what cases a *cestui que trust* may be barred of his trust estate by a fine of a stranger, it will also be necessary to enquire how far a fine levied by a *cestui que trust* is a bar of his trust estate.

Before the statute of uses, if a *cestui que use* had levied a fine it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees. But modern chancellors have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust*, shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. So that now a *cestui que trust* in tail may by a fine duly levied, bar his issue as fully, as if he had the legal estate: for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from exercising the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities.

A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute.

We have seen that a copyholder cannot implead or be impleaded for his copyhold in the king's courts, and therefore cannot levy a fine of it in the court of Common Pleas: but notwithstanding this principle, a copyhold estate is considered as an interest within the statute 4 *Hen.* 7. and therefore may be barred by a fine, levied by the person who has the freehold of the land.

Thus if a copyholder be disseised, and the disseisor levies a fine with proclamations, both the lord of the manor, nor,

Year Book
27 *Hen.* 8. 20.
Bro. Ab. Tit.
Fine, pl. 4.

1 *Chan. Ca.*
213.
Cases Temp.
Talbot 43.

Baskett v.
Peirce,
1 *Vern.* 226.

Copyholds.
Ante p. 57.

Co. Cop. f.
55.

nor, and the copyholder, will be barred, if they do not make their claim in due time.

So if a copyholder makes a feoffment in fee, and the feoffee levies a fine with proclamations, and five years pass without any claim, the lord of the manor will be barred.

Margaret
Podger's
Case,
9 Rep. 104.

Thomas Wise being seised of the manor of *Hampenbridge*, in which there was a custom, that certain lands within the said manor, were demised and demisable, by copy of court roll, for one, two or three lives; demised the premises in question to *John Podger*, and *Elizabeth* and *Mary* his daughters for their lives. *John Podger* being so seised, *Thomas Wise* the lord of the manor, by deed indented and inrolled, bargained and sold the said lands to *John Podger* and his heirs, by force of which he became seised of the freehold and inheritance thereof; and being thus seised, *Thomas Wise* levied a fine of the same, to him and his heirs with proclamations. Upon the death of *John Podger*, these lands descended to his son, and his daughter *Elizabeth* neglected to enter within the five years. It was unanimously resolved, that lands held by copy of court roll were within the words and intent of the statute 4 *Hen. 7.* for the purview of the act is general, declaring a fine to conclude as well parties as strangers to the same; and the words of the saving being "such right, claim and interest," extend to a copyhold estate.

There is a custom in most manors, that a copyhold may be intailed, but even if a fine were allowed to be levied in the court of the manor whereof such copyhold was held, it would not bar such an intail, because it was not levied pursuant to the statute 4 *Hen. 7.* unless it was allowed by the custom to have that effect.

Terms for
Years.

Saffyn's Case,
5 Rep. 123.
Cro. Jac. 60.

Terms for years may be barred by a fine and non-claim, if the lessees were or ever might have been in possession.

Thus where a lease for years was made of certain lands, to begin after the determination of a lease then subsisting; the first term expired, the second lessee neglected to enter, and the person in reversion entered, made a feoffment, and levied a fine with proclamations of the lands. Five years past without any claim being made by the second lessee, and the question was, whether he was barred by the fine. It was resolved, that although a lessee for years had not himself such an estate as would enable him to

levy

levy a fine, yet it did not, therefore follow, that his interest should not be barred by a fine; that a term for years was within the statute 4 Hen. 7. being comprehended under the word *interest*, and as the object of that act was to prevent strifes and debates, it would not have that effect, if its operation did not extend to long terms for years which are now so common.

This principle was carried so far that where a person, *Ischam v. Morrice*, Cro. Car. 110. who had a long term for years, assigned it over to a trustee, in trust for himself, then purchased the freehold and inheritance of the lands, and levied a fine: it was resolved that the term was barred, the assignee of it having suffered five years to pass, without making any claim.

Mr. Justice *Ventris* has taken notice of this case, and 2 Vent. 319. observed, that the cognizor of the fine, who was also the purchaser of the freehold, did not know of the term, or that it was held in trust for him; so that if the fine had not barred it, he would have been cheated. But that where a term is assigned in trust for the person who is seised of the inheritance, and who is in possession, a fine levied by him will not destroy the term, because the owner of the inheritance is, in cases of that kind, tenant at will to his trustee; and this rule has ever since been adhered to.

So that it is now a settled principle, that terms for years, which are kept on foot by purchasers, for the purpose of protecting the inheritance, are not barred by a fine, otherwise fines would frequently weaken the interest of purchasers, instead of adding to their security.

A term which is vested in trustees on any particular trust (except that of protecting the inheritance) may also be barred by a fine and non-claim.

Thus where *A.* had a term for years vested in him for securing children's portions, *B.* being in possession, levied a fine, and five years passed without any claim being made. It was resolved by the court of King's Bench, that, admitting the term was in trust, it was barred by the fine. *Hanmer v. Eyton*, Comb. 67. 1 Chan. Rep. 27, 33.

If a person makes a lease for years, and still continues in possession, he is considered as tenant at will to the lessee for years; and if the lessor, being thus in possession, levies a fine, it will be no bar to the term for years, because the possession of the tenant at will being the possession of the person in remainder, his interest is not divested; and

and it will be shewn in a subsequent part of this work, that no estate is barred by a fine, unless it be divested out of the real owner.

Focus v. Salisbury, Hard.
400. 3 Bac.
Ab. 448.

Thus where a person who was seised in fee, for the continuance of his estate in his name and family, made a lease for five hundred years to trustees in trust, that he himself should receive the profits during his life, and that afterwards his brother should receive them. Some time after, the lessor being in possession according to the trust, covenanted with other trustees for the same considerations, to stand seised of those lands to the use of himself for life, remainder to the use of his brother, &c. and that the said lease, and all other estates made or to be made by him, should be and enure to the said uses, and then levied a fine. A question arose, whether the term for five hundred years was barred by the fine and non-claim. Sir *Matthew Hale* observed, that nothing had been done in this case whereby the estate of the lessee was divested or displaced; for the lessor continuing in possession, by permission of the lessees, as must be presumed, he was only tenant at will to the lessees, and therefore his fine had no operation: besides, there was a privity between the lessor and lessee, which prevented the fine from operating as a bar to the term.

Corbett v. Stone,
Sir T. Raym.
140.

No judgment appears to have been given in this case; but in another, which was exactly similar, it was determined that a fine was no bar to a term of this kind.

If a person who has made a lease to trustees, and has still continued in possession, makes another lease of the same lands, and levies a fine to confirm it, the first lease will be divested by the second; so that it will then be barred by the fine and non-claim.

Freeman v. Barnes,
1 Vent. 55.
1 Lev. p. 1.
270.
3 Bac. Ab.
449.

The Marquis of *Winchester* made a lease for a hundred years, in trust to attend the inheritance, and the lessee entered. The marquis afterwards made a lease for fifty-four years, and, to confirm it, levied a fine with proclamations. The lessee for fifty-four years entered; and the lessee for one hundred years being out of possession, assigned his term to the plaintiff.

The question was, whether the fine and non-claim barred the term of one hundred years.

It was adjudged that the marquis, when he entered after he had made the lease for one hundred years, was
tenant

tenant at will, but that he had devested that term by making the subsequent lease for fifty-four years; for it was in the power of the marquis either to devest the term of one hundred years or not, and he had made his election by levying the fine; so that the term for one hundred years being thus devested by the lease for fifty-four years, was barred by the fine. But in this case all the judges agreed, that terms for years, kept on foot by purchasers to protect their estates, should not be barred by a fine and non-claim.

Estates held by statute merchant, statute staple, and *estates held by elegit*, are comprehended within the statute 4 Hen. 7. *Statute Merchant, &c.* and may therefore be barred by a fine and non-claim, provided the lands be extended. *2 Inst. 517. 5 Rep. 124. 2. Ognell*

Thus, upon a trial at bar, the court delivered it as law to the jury, that where lands were actually extended on a writ of *elegit*, the tenant by *elegit* might be barred by a fine and non claim; and that if an inquisition upon an *elegit* be found, the party has the possession before entry, and may bring an ejectment or action of trespass. *v. Lord Arlington, 1 Mod. 217.*

So in the case of *Deighton v. Grenville*, which will be stated in the next chapter, all the judges agreed, that although the cognizees of statutes merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry, and therefore they might be barred by a fine.

The estate of a devisee may be barred by a fine and non-claim if the devisee has not entered. *Devisees.*

Thus where *John Metcalf* devised lands to *John Gallant*, an infant of the age of three years, in fee. The son and heir of *John Metcalf* entered on the lands, and levied a fine of them. *John Gallant* the infant died before he attained his full age, leaving a sister, who was then married. The court were of opinion, that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her. *Hulm v. Heylock, Cro. Car. 200.*

Executors to whom lands are devised for payments of debts, may also be barred by a fine levied of the lands thus devised, if they do not make their claim in due time. *Executors to whom Lands are given for Payment of Debts.*

A title of entry for a condition broken may be barred by a fine levied by the grantee or devisee of the conditional estate. *5 Rep. 124. 2. A title of Entry for a Condition broken.*

Thus,

Mayor of
London
v. Alsford,
Cro. Car.
575.
1 W. Jones
452.

Thus, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a schoolmaster, &c. and, on non-performance of the trusts, the lands were devised over to other persons. The trustees neglected to perform the trusts, and levied a fine of the lands. It was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

Shep. Tou.
154.

A title of entry for a condition broken, may also be barred by a fine levied by the grantor of the conditional estate: as if a person makes a feoffment, on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee, or to any other person, the condition will be thereby discharged for ever. But if the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and conveyance will be construed together, and will operate as one assurance.

Cromwell's
Case,
2 Rep. 69.

It seems, that a right or title of entry on any other account may also be barred by a fine.

Thomasm
v. Mack-
worth,
Carter 75.

Thus where *Humphrey Mackworth* was seised to him and his heirs, provided that if a hundred pounds was not paid within three months after the birth of a child, the trustees should enter. The money was not paid; so that the estate of *Humphrey* being with a *quousque* ceased, but the trustees did not enter. *Humphrey* conveyed away the lands by lease and re-lease, and levied a fine; after which five years passed. Lord Chief Justice *Bridgeman* delivered the opinion of the court, that the entry of the trustees was barred by the fine.

A power ap-
pendant, or in
gross.

1 Inst. 237. 2
3 Rep. 83. 2

A power appendant, or in gross, may be barred by a fine levied of the lands to which the power relates, by the person to whom such power is reserved; because, by the fine, the person acknowledges all his right and interest in the lands to be vested in another; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over those lands. Besides a power appendant, or in gross, being part of the old dominion, is considered as an interest, which may be released.

Digges's
Case,
3 Rep. 173.

Thus where *Christopher Digges*, being seised in fee, covenanted to stand seised to the use of himself for life, remainder

remainder over, reserving to himself a power of revocation, by deed indented and inrolled. *Christopher Digges* revoked the uses; but, before the deed of revocation was inrolled, he levied a fine. It was resolved that the fine being levied before the inrolment of the deed of revocation, until which time the revocation was imperfect, had destroyed the power.

A power of revocation may also be destroyed in part, ^{1 Inst. 215. a.} by levying a fine of part of the land, and yet the power ^{Shep. Tou. 503.} will continue good as to the residue.

If a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will in that case be considered as one assurance, and will not destroy the power.

Thus where Sir *J. Williams*, being seised in fee, made ^{Herring v. Brown,} a voluntary settlement to the use of himself for life, re- ^{2 Show. 185.} mainder to his brother Sir *M. Williams* in tail, reserving ^{1 Vent. 368.} to himself a power of revocation. Some time afterwards, ^{Carth. 22.} Sir *J. Williams* levied a fine, and by a deed made between ^{Comb. 11.} him, his brother Sir *M. Williams* and others, bearing ^{Skin. 184.} date a month after the fine was levied, reciting the fine, ^{1 Freem. 486.} it was declared, that at the time of levying the said fine, the agreement of all the parties to the deed was, that it should enure to the use of Sir *J. Williams* and his heirs.

It was objected that Sir *J. Williams*, by levying this fine, without any precedent declaration of the uses to which it should enure, had destroyed his power of revocation, and forfeited his estate for life; for the deed being subsequent to the fine, was ineffectual, because there was an intermediate time between the levying of the fine and the execution of the deed, in which the forfeiture attached, and the power was destroyed; so that no subsequent act could purge the forfeiture which once attached, nor revive the power which was destroyed: for these reasons, and upon the authority of *Digges's* case, it was adjudged in the court of King's Bench, that Sir *J. Williams* had, by levying the fine, destroyed his power of revocation, and therefore that the subsequent declaration of uses was void.

On a writ of error to the Exchequer Chamber, this judgment was reversed by the opinion of six judges against two;

two; it being determined that the fine and declaration of uses were to be considered as one and the same conveyance, and operated as an execution, and not as an extinguishment of the power. It was agreed that a fine alone, without a deed to declare the uses of it, would have extinguished the power, but that it was otherwise where there was a deed, declaring what the intention of the parties was when the fine was levied; and although the date of the deed was subsequent to that of the fine, (for no other reason, perhaps, but because the fine was levied in the vacation, and was dated as of the preceding term) still it was possible that the deed was executed at the time the fine was acknowledged; so that it would be unreasonable to make a forfeiture or extinguishment of a right merely by relation, which is but a fiction of law.

This doctrine has been confirmed by the court of King's Bench, in the case of *Doe*, on the demise of *Odiarne v. Whitehead*, which will be stated in a subsequent chapter: so that now whenever a fine is levied, and a declaration of the uses of it is afterwards executed, the fine and declaration of uses will be considered as one assurance.

*But not a
Power colla-
teral to the
Land,*

1 Inst. 237. a

1 Rep. 174. a.

A power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine, levied by the person to whom such a power is reserved; because it is considered as a bare and naked authority, which cannot be released or divested.

Thus it is said by Lord Chief Justice *Popham*, in *Digges's* case, that if a feoffment was made to *A.* in fee to divers uses, with a proviso that it should be lawful for *B.* to revoke those uses. *B.* could not in that case release his power, nor extinguish or destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

It follows from the same principles that a collateral power cannot be barred by the fine of a stranger.

*Willis v.
Shortall,*
1 Atk. 474.

Thus where a person by a proviso in his marriage-settlement gave his wife a power to dispose of one hundred pounds to such persons as she should appoint, to be paid within one year after his decease; and in default of payment one *John Moreton* was empowered to make a lease of certain lands to raise that sum; the wife, in a year after the

the death of her husband made an appointment of this sum, but it was not paid; the heir of the husband levied a fine of the land, and five years passed, and afterwards the appointees of the one hundred pounds brought their bill to be paid that sum.

Lord *Hardwicke* observed, that although by the several statutes relating to fines, all right, claim, and interest which strangers had, were barred by a fine, yet that such a stranger as *John Moreton*, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

A fine and non-claim is a good bar to a writ of error, in consequence of the word, actions, in the Second Saving of the statute, 4 *Hen. 7.* and a fine is also a good bar to a writ of error to reverse a common recovery.

Writ of Error,
Bartholemew
v. Bellfield,
Cro. Jac. 532.

CHAPTER XII.

*Of the Different Savings in the Statute, 4 Hen. 7. and the Exceptions in favour of Infancy, Cover-
ture, &c.*

THE great inconveniencies which arose from the statute of non-claim, were removed by the statute, 4 Hen. 7. and a proper medium was established between the unbounded latitude given by that statute, and the rigor of the common law; for the doctrine of non-claim was restored, but the time allowed for making the claim was extended, from one to five years.

Of the First Saving, 4 H. 7. c. 24. s. 3. The words of this clause, which is called the First Saving are; "And saving to every person and persons, and to their heirs, (other than the parties to the said fine) such right, claim, and interest as they have to, or in the said lands, tenements or other hereditaments, at the time of such fine ingrossed, so that they pursue their title, claim, or interest by way of action or lawful entry, within five years next after the same proclamations had and made."

Shep. Tou.
29.
3 Keb. 293.
p. 19.
Plowd. 375.
1 Will. R.
p. 2. 19.

In consequence of this clause it follows, that all those who have any present right or claim to lands whereof a fine is levied, are allowed five years, to be counted from the day on which the last proclamation was made, to make their claim; and although there be no transmutation of possession and the cognizor be in of the old use, yet after five years it will operate as a bar to all claims whatever; so that if a tenant in tail be disseised, and the disseisor levies a fine with proclamations, the tenant in tail, having a present right, may defeat the fine at any time within five years after the last proclamation has been made; but if he neglects to make his claim until that time is expired, he will be for ever barred by the fine; and if the tenant in tail dies before the five years are expired, his issue will not be allowed five years more to make his claim, but only so much of the five years as was not passed in the life-time of his ancestor.

Shep. Tou.
29.

With

With respect to the mode of avoiding a fine, within the term prescribed by the statute, it will be pointed out in a subsequent chapter.

By the common law, persons in remainder and reversion were frequently barred by the neglect of the particular tenant in making a claim within a year and a day after the fine was levied; and this is usually assigned as the only reason for making the statute of non-claim; but cases of this kind are particularly provided for in the following clause of the 4 Hen. 7. which is usually called the Second Saving: *Of the Second Saving.*

“ And also saving to all other persons, such action, right, title, claim, and interest in or to the said lands, tenements, or other hereditaments, as shall first grow, remain, or descend, or come to them after the said fine ingrossed, and proclamations made by force of any gift in tail, or by any other cause or matter had and made before the said fine levied, so that they take their action, or pursue their right and title according to law, within five years next after such action, right, claim, title, or interest, to them accrued, descended, fallen or come.” *Antep. 79. 4 H. 7. c. 24. l. 4.*

In consequence of this clause, all those to whom a right first accrues, at any time after a fine has been levied, are allowed five years, to be computed from the day on which their right first accrued, to make their claim.

Thus if a tenant in tail makes a feoffment, and the feoffee levies a fine, the issue in tail is within the second saving, and shall have five years from the death of his father to make his claim and avoid the fine: because he is the first to whom a right accrued and descended after the fine was levied, for his father could not enter against his own feoffment. *3 Rep. 87. a. & b. Plowd. 374.*

In the same manner if a tenant in tail bargains and sells his estate tail to a stranger in fee, who levies a fine of it with proclamations; the issue in tail is within the second saving, because the right first accrued to him, as his father could not enter against his own bargain and sale. *Penyfton v. Lyfter, Cro. Eliz. 896.*

No person however is within the second saving but he to whom the right of avoiding the fine first accrued, so that those who claim under the person to whom such right accrued, are only allowed so much of the five years

years as have not elapsed in the life-time of their ancestor.

3 Rep. 87. b.
Plowd. 374.
Cro. Eliz.
896.

Thus if a tenant in tail be disseised and the disseisor levies a fine, the right of reversing the fine first accrues to and attaches in the tenant in tail himself, so that if he lets five years pass without impeaching the fine, and then dies, his issue will be for ever barred, for they are not within the second saving, because the right first accrued to their ancestor and not to them.

Plowd. 374.
Shep. Tou.
30.
Sir T. Raym.
151.

If a tenant in tail either of a legal or a trust estate levies a fine, and five years pass, and afterwards the tenant in tail dies without issue : the persons in remainder or reversion are within the second saving, and have therefore five years to make their claim, from the death of the tenant in tail without issue, because their right did not accrue until the determination of the estate tail.

Shep. Tou.
31.

If a tenant in tail discontinues his estate, reserving a rent and dies, and the issue in tail accepts of the rent from the discontinuer, who afterwards levies a fine with proclamations ; the acceptance of the rent by the issue in tail, bars him from claiming any right to the estate tail ; but upon the death of the issue in tail, his issue will have five years to avoid the fine, in consequence of the second saving, because he was the first person to whom the right of reversing the fine accrued.

Ante p. 63.

1 Inst. 326.
2 Inst. 681.
3 Rep. 72, b.

In consequence of the statute, 32 Hen. 8. c. 28. which has been stated in a former chapter, a fine levied by a husband alone of any lands which are the freehold or inheritance of the wife, shall not make any discontinuance, or be prejudicial to the wife or her heirs, but she or they may enter on the lands and defeat such a fine.— Although the words of this act are very general, yet if the husband levies a fine with proclamations, and five years pass after his death, without any entry or claim by the wife, she will not only be barred of her entry, but also of her right ; because the object of the statute was only to provide against the discontinuance, which was a grievance peculiar to married women ; but not to invalidate fines duly levied, as to married women, they having a remedy in common with others, by entry or claim to avoid the fine. Besides, though the words of the statute 32 Hen. 8. are general, “ that such a fine shall not be
“ preju-

"prejudicial to the wife or her heirs" yet the following words, *viz.* "But that she may lawfully enter according to her right and title therein," are explanatory, and allow her an entry only in such cases, where she had a right before the statute.

If a married man levies a fine of his own inheritance, and five years pass, his wife is not thereby barred of her dower, but is within the second saving of the statute, and will be allowed five years from the death of her husband to make her claim, because her title to dower did not accrue until that period. ^{1 Inst. 326. a.}
^{3 Inst. 216.}

Plowden was of opinion that in this case the wife was not bound to make her claim within five years after the death of her husband, but might claim her dower at any indefinite time, but Sir *Edward Coke* says the contrary was expressly determined in 4 *Hen. 8.* and that determination has ever since been adhered to. ^{Plowd. 373. Note.}

If the wife's title to dower does not accrue at the death of her husband, but commences at a subsequent period, she will be allowed five years from the time when it accrued. ^{2 Rep. 93. a.}
^{9 Vin. Ab. 245.}

A married man levied a fine with proclamations, and was afterwards indicted and outlawed for treason. Some years after his death his heirs reversed the outlawry by writ of error, and then his wife claimed dower. It was resolved that although more than five years had passed since the death of the husband, yet the fine was no bar to her, because as long as the attainder for treason stood in force she could not claim her dower, but as soon as the outlawry was reversed, a title to dower first accrued to her, and therefore she was within the second saving, and had five years from the reversal of the outlawry to pursue her right. ^{Menvill's Case, 13 Rep. 19. 2 Hawk. P. C. c. 49. f. 44.}

If there be no person who has a right to make a claim at the time when a fine is levied, and afterwards some person does acquire such a right, he will be allowed five years from the time when he acquired the right of avoiding the fine to make his claim.

Thus where a person who had a term for years in reversion, expectant on another term for years, died; the first term expired, the lessors entered and levied a fine with proclamations. Five years passed before admission was granted of the effects of the person who ^{Standford's Case cited, Cro. Jac. 61. 5 Rep. 124.}
I had

had the reversionary term. It was resolved, that the administrator was within the second saving of the statute, and should have five years to pursue his right from the time administration was granted; because until then there was no person who could claim.

*Of Persons
having different
Rights.*

Strangers to fines, who have several distinct rights, by several titles, accruing at different times, shall have several periods of five years allowed them to avoid a fine; that is, five years after the accruing of each title, so that if a right accrues to a stranger, when a fine is levied, which he neglects to pursue within the limited time, and another right accrues, to the same stranger at any time afterwards he is then comprehended within the second saving of the statute as to the right, upon the principle that *quando duo jura in una persona concurrent æquum est ac si essent in diversis*. This construction is certainly not consistent with the letter of the statute, for in consequence of the words "other persons," it appears clearly to have been the intention of the statute, that no person who was comprehended in the first saving should take advantage of the second, and in the case of *Stowell* and *Zouch*, Lord Chief Justice *Dyer* contended, that this was the true construction of the statute: but however the law has always been held otherwise.

9 Rep. 105.
b.

Plow. 372,
373, 374.

*Laund v.
Tucker,
Cro. Eliz.
254.
Id. 220.*

Thus, if a tenant for life levies a fine, and the person in reversion neglects to enter within five years, and afterwards the tenant for life dies, the reversioner shall have another period of five years from the death of the tenant for life, to make his claim, because in this case two distinct rights accrued to him, the first upon the forfeiture, which the tenant for life committed by levying the fine, and the second upon the death of the tenant for life.

Plowd. 374.
Shep. Tou.
31.

So if a tenant for life be disseised, and the disseisor or a stranger levies a fine, the person in reversion will be allowed five years from the death of the tenant for life to reverse the fine, and will not be barred by his non-claim during the five years which passed immediately after the fine was levied.

9 Rep. 105.
b.
Plowd. 375.

It is laid down by Sir *Edward Coke*, that if a lessee for years is ousted, and the person in reversion disseised, and the disseisor levies a fine with proclamations, both the lessor and lessee are barred, if they do not make their claim

claim within five years after the fine has been levied; and the lessor will not be allowed another period of five years, after the expiration of the term to make his claim; because the lessor might have brought an assize or other real action, immediately after the fine was levied, and being thus comprehended within the first saving, he cannot take advantage of the second; but this doctrine has been since contradicted, and is not now held to be law.

Thus, where a lessee for twenty-one years, who was seised in fee of other lands in the same manor, made a lease for life of all the lands, and levied a fine with proclamations of as many messuages, &c. as comprehended not only the lands whereof he was seised in fee, but also the lands which he held for years; the lessee continued in possession and paid his rent. Upon the expiration of the term, the lessee claimed the inheritance of the land which he had held by lease, and would have barred his lessor by means of the fine and non-claim; but it was determined by all the judges, that the lessor should have five years from the expiration of the term to make his claim, and avoid the fine.

This determination is said by Sir Edward Coke to have been founded on the circumstances of fraud which appeared in the case, the principal of which was, that the lessee continued in possession after he had levied the fine, and regularly paid his rent, so that the lessor could have no notice that a fine had been levied of his lands. But in other books the judgment is said not to have been founded on the fraud which appeared in the case, but upon the construction of the statute; and the doctrine that where a fine is levied by a lessee for years, the lessor need not make his claim immediately, but is in all cases allowed five years from the determination of the term to avoid the fine, was finally established in the following case.

A lessee for years made a feoffment, and levied a fine, five years passed, and the question was, whether the lessor was barred by his non-claim during the five years after the fine was levied, or should be comprehended within the second saving of the 4 Hen. 7. and be allowed another period of five years from the expiration of the term. The court resolved that the lessor should have five years from the expiration of the term to avoid the fine, in the same manner

Fermor's

Case,

3 Rep. 77.

2 And. 176.

2 Vent. 334.

2 Vent. 242.

Whaley v.

Tancred,

2 Vent. 241.

Sir T. Ray.

219.

1 Lev. p. 2.

32.

3 Keb. 37.

1 Atk. 571.

S. P.

manner as if a lessee for life had levied a fine, the case being exactly similar.

No person who is within the first saving of the statute 4 *Hen. 7.* can be comprehended in the second saving, unless the second right which accrues to him is different from the first, for if it is only the same right which accrues a second time, the non-claim for five years after the right first accrued will be a good bar.

Salvin v.
Clerk, Crd.
Jac. 156.

Thus, where a tenant in tail made a lease, which was warranted by the statute 32 *Hen. 8.* then levied a fine, and died without issue; five years passed without any claim, but on the expiration of the lease, the person in remainder entered. The court determined that he was not within the second saving of the statute, because no new right accrued to him on the expiration of the lease, and therefore that his right was barred by the fine.

If lands are extended on two statutes, and the person who is seised of the land levies a fine, it devests the estates of the cognizees of such statutes, and the cognizee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be forever barred. But with respect to the cognizee of the second statute, he need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent, so that he will have five years allowed him from that time to avoid the fine; by the second saving in the statute 4 *Hen. 7.* because until then his right did not accrue.

Deighton v.
Grenville,
2 Vent. 333.
1 Show. 36.
1 Skin. 260.

Thomas Lewis being seised in fee of the premises in question, acknowledged a statute for 1200*l.* to *William Knight*, he afterwards acknowledged another statute for 1000*l.* to *Richard Gerrard*, and another for 5000*l.* to Sir *James Elwes* and *Richard Burrows*; execution was sued out on all these statutes, and the lands were extended. *Thomas Lewis* being in actual possession sold the premises for 4000*l.* to *John Lewis*, and levied a fine of them with proclamations. *John Lewis* devised the lands to his brother *Edward Lewis*, and the heirs male of his body, and for want of such issue to his own two daughters. *John Lewis* died, and *Edward Lewis* being in actual possession, levied a fine with proclamations, to the use of himself and his heirs, and died without issue, whereby the lands descended to the two daughters of *John Lewis*, who entered,

entered, and having married the Earls of *Huntingdon* and *Scarsdale*, they also entered, and were seised in right of their wives. Administration to *Burrows*, the surviving cognizee of the last statute was committed to *Ann*, wife of the defendant *Grenville*, as to that statute, and the extent thereon, and *Grenville* and his wife, who was also administratrix to *Gerrard* the cognizee of the second statute, having acknowledged satisfaction upon it, and caused it to be vacated, entered upon the Earls of *Huntingdon* and *Scarsdale* as administratrix to *Burrows*, in whom the last statute was vested, and claimed the money due on it, whereupon the said Earls brought an ejectment in the court of King's Bench in the name of *Deighton*, for the recovery of the lands.

The question was, whether *Grenville* as representative to *Burrows*, the cognizee of the last statute, which was a reversionary interest to commence after the determination of *Gerrard's* extent was barred by the fine of *Thomas Lewis*, and five years non claim, or was within the second saving of the statute 4 *Hen. 7.* and should be allowed five years to make his claim from the time, when satisfaction was acknowledged on *Gerrard's* statute.

The case was argued several times in the court of King's Bench, and in 4 *Jac. 1.* judgment was given for *Grenville*, that *Burrows's* interest was not barred by the fine. A writ of error was brought in the Exchequer Chamber, where the case was also several times argued. Mr. Justice *Ventris* contended that there was a very great difference between this case and the cases of reversions on estates for lives or years. 1st. Because in those estates there was either by an express limitation of the parties, or the operation of law, a certain end of the estate beyond which it could not last, and until which it was not properly determined, which an extent held by extent has not. 2d. Because if a person who has a reversion after an estate held by extent, was allowed five years to make his claim after the extent was determined by a perception of the profits, or an acknowledgment of satisfaction on record, then a claim was let in after an estate which no man could see the end of, for no person could tell when an extent would be satisfied by a perception of the profits, and much less whether satisfaction would ever be acknowledged; whereas other estates have a known and certain deter-

Vide 2
Ventris 333.

determination, so that it would be impossible to tell within what space of time a possession could be quieted, and thus the great end of the statute of fines would be defeated. 3. Because it would be in the power of the party who had the extent, to protract the time as long as he pleased, for until he thought proper to bring a *scire facias ad computandum* the statute would never be satisfied, so that it would be in the power of a stranger to make the estate of a person who was in possession under a fine, liable to a future claim as long as he pleased.

The judgment of the court of King's Bench was reversed by a majority of six judges against two. But that court refused to award execution, because there was a mistake in the writ of error, upon which a new writ of error was brought, whereon the judgment was affirmed for *Grenville*, there being three judges for reversing, and three for affirming, and a majority being required to reverse the judgment, it was of course to stand.

MS. Cases
in the House
of Lords.

A writ of error was then brought in the House of Lords, where it was contended, on the part of the plaintiff, that Mr. *Grenville* could not, by acknowledging satisfaction on *Gerrard's* statute, gain any new right to enter to avoid the fine levied by *Edward Lewis* above nine years before, by which, and by five years non-claim, her interest in the last extent was barred, because an entry might and ought then to have been made into the extended estate, and the contrary opinion would tend very much to weaken the security of a fine and non-claim, which is the highest and best security in the law for quieting people in their estates, and preventing suits; and it would therefore be of very pernicious consequence to all purchasers and owners of estates, if such old dormant incumbrances were set up against a fine and non-claim, and supported by such a method as the vacating a statute long before extinguished, for thereby estates might be incumbered, which had been long enjoyed without interruption.

On the other side it was argued for the defendant, that it was not necessary to make any claim upon *Burrows's* statute, until *Gerrard's* statute appeared upon record to be satisfied, and so a claim made by the defendant by entry upon the premises, within five years after satisfaction entered upon record, on *Gerrard's* statute, was sufficient to

to prevent *Burrows's* extent from being barred by the fine.

That this case did not differ in reason from the common and known case where *A.* tenant for life, remainder in fee to *B.* is disseised, and the disseisor levies a fine, and there is five years non-claim, though the estate of tenant for life be barred by this five years non-claim, and the remainder man may if he please enter upon the five years non-claim by tenant for life; yet he may waive such entry, and will have a new period of five years after the death of tenant for life, to make his claim; so although *Burrows* might, if he had pleased, have entered upon the five years non-claim by *Gerrard*, yet he might stay and expect until satisfaction was entered upon the record of *Gerrard's* statute; for as the death of the tenant for life is the proper and natural determination of an estate for life, so the entering satisfaction upon record is the proper and natural determination of an extent upon a statute, and in the one case as well as the other, before such determination, the remainder man or reversioner is not compellable to make his claim to avoid the fine.

The judgment of the court of King's Bench was affirmed (a). 26th April, 1699, Lords Journ. vol. 16. p. 454.

* Although the statute 4 *Hen. 7.* does not extend to the possessions of the church, yet in case bishops, deans, vicars, or prebendaries, neglect to make their claim within five years after a fine has been levied of their estates, they themselves will be barred during their respective lives, but each of their successors will be allowed five years to avoid the fine, from the time of his becoming intitled to the lands. * Vide infra, ch. 13. 1 Plowd. 538.

In the same manner, all those who have offices for life *Idem.* to which lands and tenements are annexed, must make their claim within five years after a fine has been levied of such lands and tenements, otherwise they also will be barred during their lives. But each successive officer will be allowed five years to avoid the fine, from the time when he becomes intitled to the lands.

If the estate which passed by a fine is at any time afterwards defeated, it thereby loses all its force and effect, Plowd. 358.
not

(a) This appeal to the House of Lords is not mentioned in any of the Reporters.

not only with respect to the person who avoided it, but also with respect to all others whatsoever (except persons claiming by force of an intail) and it may be set aside at any indefinite period of time.

Of the Exceptions in favour of infancy, &c.

Bract. lib. 5.

c. 29. f. 3.

Fleta. lib. 6.

c. 54.

2 Inst. 516.

Secl. 5.

By the common law, and also by the statute *de modo levandi fines*, all those who laboured under certain disabilities at the time when a fine was levied, were not affected by it; but they or their heirs might avoid it at any distance of time. The same principle was partly adopted in the following clauses of the 4 Hen. 7. "And if the same

"persons at the time of such action, right and title accrued, descended, remained, or come unto them, be covert de baron, or within age, in prison, or out of this land, or not of whole mind; then it is ordained, &c. that their action, right and title, be reserved, and saved to them and their heirs, until the time they come and be at their full age of twenty-one years, out of prison, within this land, uncovert, and of whole mind; so that they or their heirs take their said actions, or their lawful entry, according to their right and title, within five years next after that they come and be at their full age, out of prison, within this land, uncovert, and of whole mind; and the same actions pursue, or other lawful entry take, according to law."

Secl. 6.

"And also it is ordained, &c. that all such persons as be covert de baron, not party to the fine, and every person being within age of twenty-one years, in prison, or out of this land, or not of whole mind, at the times of the said fines levied and ingrossed, and by this act before excepted, having any right or title, or cause of action to any of the said lands and other hereditaments, that they or their heirs, inheritable to the same, take their said actions, or lawful entry, according to their right and title, within five years next after that they come and be of age of twenty-one years, out of prison, uncovert, within this land, and of whole mind, and the same actions sue, or their lawful entry take, and pursue according to the law; and if they do not take their actions and entry as is aforesaid, then they, and every of them, and their heirs, and the heirs of every of them, be concluded by the said fines for ever, in like form as they that be parties or privies to the said fine."

In

In consequence of these two clauses, all those who labour under any one of the disabilities therein specified, either at the time when a fine is levied, or when a right accrues to them, are allowed five years, from the removal of their disabilities, to make their claim.

Thus, if *A.* be tenant in tail, with remainder to *B.* in fee, and *A.* levies a fine with proclamations, and five years pass, then *B.* the remainder man dies, leaving issue a son under age, and afterwards *A.* dies without issue; the son of *B.* being under age at the time of *A.*'s death without issue, at which time the right to the remainder first accrued and vested in him, will be allowed five years to make his claim, from the time he attains his full age.

If an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age to make his claim; for although he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception.

The privileges of infancy, coverture, &c. are only given to those to whom a right first accrues, and in whom it first attaches; for if a person to whom a right first accrues dies before the expiration of the five years which are allowed him to make his claim, and such right descends upon his son or heir at law, who is then under age, or labours under any of the other disabilities mentioned in the act, still such son or heir must make his claim before the five years are expired, which commenced in the lifetime of his ancestor, otherwise he will be for ever barred, because the right did not first accrue to him, but to a person who was not under any disability.

John Stowell being seised in fee, was disseised by *John Zouch*, who levied a fine with proclamations. Three years after the fine was levied *John Stowell* died, without having made any entry or claim to avoid the fine, leaving his grandson and heir at law, *Thomas Stowell* the demandant, an infant of the age of six years, who made no claim during his minority, but entered on the lands within one year after he had attained his full age.

It was determined by a great majority of all the judges in the Exchequer Chamber, after many solemn arguments,

1. That

Stowell v. Zouch.
Plowd. 55.
Jenk. Cent.
6. Case 74.

1. That *Thomas Stowell* being a stranger to the fine, was clearly barred by the body of the act, unless he would take advantage of the exception in favour of infants, &c. ; and that he was not within the exception, because it only extends to such infants, &c. to whom a right accrues at the time when a fine is levied : whereas in the present case, no right accrued to *Thomas Stowell* at the time when the fine was levied, his grandfather being then living.

2. That *Thomas Stowell* was originally within the first saving of the statute, as heir to his grandfather, to whom the right first accrued, being included in the words “ saving to every person and persons, and to their heirs ;” but not having pursued his remedy within the time prescribed, he could not now take any advantage of the first saving : and, with respect to his infancy at the time of his grandfather’s death, it could be of no service to him, because the statute only gives the privilege of infancy to those to whom a right first accrues : but where a right first accrues to a stranger who is of full age, and the five years begin to run, if such stranger dies before the expiration of the five years, leaving his heir under age, the heir can have no privilege of infancy, but must make his claim before the expiration of the five years, which began to run in the time of his ancestor.

3. That *Thomas Stowell* was not within the second saving, which preserves to *all other* persons such right, title, &c. as shall first grow, remain, or descend to them, after the said fine ingrossed for several reasons ; 1. Because, in consequence of the words *other persons*, this saving only extends to those who are not comprised in the first ; and it was not the intention of the act to aid those persons in the second saving who are comprehended in the first. 2. The words “ first grow, remain, or descend,” only extend to the person in whom the right first attaches after a fine is levied ; whereas no new right accrued to *Thomas Stowell* after the fine was levied, his only title being as heir to his grandfather, in whom the right attached when the fine was levied.

Vide Dyer,
2. b.

It was argued by some of the judges, that every successive issue in tail was within the second saving of the statute, as a new right descended to him *per formam doni* ; but this opinion was condemned by a great majority.

If

If a person to whom a right accrues at the time when a fine is levied, labours under any of the disabilities specified, and excepted in the statute 4 Hen. 7. and dies before his disabilities are removed, it seems to be a doubtful point whether the heir of that person be obliged to make his claim within five years after the death of such ancestor, or be allowed an indefinite period of time for that purpose.

This doubt arises from a difference of opinion between Sir Edward Coke and Lord Chief Justice *Anderson*. Sir E. *Sunie* *Coke*, in his Report of the case of *Sunie v. Howes*, states, that *Thomas Cotton* being tenant in tail of a moiety of certain lands, and tenant for life of the other moiety, with remainder to *William Cotton*, his eldest son in tail, *William Cotton* went to *Antwerp*, *Thomas Cotton* levied a fine with proclamations of all the lands, and *William Cotton* died soon after at *Antwerp*, without having ever returned to *England*, leaving a son under age, who entered on the lands. It was adjudged, that as to the moiety, whereof *Thomas Cotton* was tenant in tail, *William* the son of *William* was barred by the statute 4 Hen. 7. But as to the other moiety, whereof *Thomas Cotton* was only tenant for life, the entry of *William* the grandson was lawful, and avoided the fine; for although *William* the son could not take advantage of the clause which saves the right of those who are beyond sea, provided they make their claim within five years after their return, because *William* never did return; yet, as persons who are out of the realm at the time when a fine is levied, having a present right, are excepted out of the body of the act, which makes the bar; therefore, where a person was beyond sea at the time when a fine was levied, and never returned, he was within the exception made in the body of the act, and his heirs might make their claim at any distance of time. That it was the same, where an infant, not being a party to a fine, and having a present right, died during his infancy, his heirs might make their claim at any distance of time. That the same doctrine took place with respect to a man *non compos*, who died in that situation, or a man in prison, who died before he had recovered his liberty, or a married woman, who died in the life-time of her husband; for all these were within the reason adjudged, of a person who was out of the realm, and never returned.

It

*Case of Persons
dying under
their Disabilities.*

Sunie v. Howes,
2 Inst. 519.
Sav. 128.
1 Leon. 211.
Cro. Eliz.
219.

It is also laid down by Sir *Edward Coke* in *Beverley's* 4 Rep. 125. b. case, "That if a man levies a fine with proclamations, and at the time of the fine levied, he who has a right is *non compos*, and afterwards he recovers his memory, in this case he ought to pursue his action, or make his entry, within five years after he becomes of sound memory; and in such case, in pleading, he shall shew, that, at the time of the fine levied, he was *non compos mentis*, and all the special matter: but if he who has such right is an idiot, or *non compos mentis*, and never recovers his memory, the heir may have his action, or make his entry when he will; for he is excepted out of the body of the act, and is not bound to make any entry, or bring his action within any time: but the party himself, if he recovers his memory. The same law, if he who is beyond sea at the time of the fine levied, and dies, there his heir may enter, or bring his action when he will."

Cotton's
Case, 1 Leon.
211.

In *Leonard's* report of *Cotton's* case, it was held, that as to the moiety, whereof Sir *Thomas Cotton* was tenant for life, the fine was no bar; but that *William* the grandson might enter at any time within five years after he attained his full age: for *William* his father was not bound by the statute 4 Hen. 7. because he was beyond sea at the time when the fine was levied, and never returned; but that, by the equity of the statute, his issue should be allowed five years to make his claim, from the time he attained his full age. And *Anderson* Chief Justice is reported to have said, that although *William* the father died beyond sea, yet if his son did not make his claim within five years after the death of his father, being of full age, and without impediment, he should be for ever barred.

1 Leon. 215.

I have not been able to find any other case in which this point has been considered, except that of *Hulm* and *Heylock*, which has been already stated, where the court concurred in opinion with *Anderson*; but as that case was determined without being argued, it cannot be much relied upon as an authority.

ante. p. 105.

As the opinions both of Sir *Edward Coke* and Lord Chief Justice *Anderson* on this point were delivered *obiter*, and in the course of argument; and as this question has (I believe) never been judicially determined, it may not be improper to add some few observations upon it.

In

In the first section of the statute, 4 *Hen. 7.* it is enacted, "that a fine shall conclude as well parties as strangers to the same, except women covert (other than be parties to the said fine) and every person then being within the age of twenty-one years, in prison, &c." And by the sixth section of the said statute it is ordained, "that all such persons as be covert de baron, &c. at the times of the said fines levied, &c. having any right or title, &c. that they or their heirs inheritable to the same, take their said actions, &c. within five years next after they come and be of age of twenty-one years, and out of prison, &c. and if they do not take their actions, &c. as is aforesaid, then they and every of them and their heirs be concluded by the said fines for ever."

To support the opinion advanced by Lord Chief Justice *Anderson*, the words "that they or their heirs," in the sixth section, must either be construed to extend, to the heir of an ancestor who dies under his disability, or else it must be admitted that this is a case not foreseen or provided for in the statute, but as the original object of fines was to preserve the peace and quiet of the kingdom, by extinguishing all dormant titles, and as the intention of the statute 4 *Hen. 7.* was to revive the doctrine of non-claim, that statute ought to be construed in such manner, as to render a fine a compleat bar to every right and claim which is not pursued within five years after it accrues; and not so as to allow in any case whatever the existence of a right to avoid a fine at an indefinite period of time.

On the other hand it may be said in support of Sir *Edward Coke's* opinion, That if no saving had been added to the statute 4 *Hen. 7.* it is clear that all those who had a right at the time when a fine was levied, and who were then under coverture, infants, &c. would have been comprehended in the exception contained in the first section of that statute, and therefore would not have been at all affected thereby.—That the word "heirs" in the sixth section of the statute was inserted merely with a view to the case of persons whose disabilities should be removed, but who should die before the expiration of the five years allowed them for making their claim, in order to confine their heirs to so much only of the five years as was not expired

expired in the life-time of the persons whose disabilities were removed, and to prevent them from claiming a new period of five years.—That this being a case unprovided for by the statute, it follows, either that the heir of a person who dies under his disabilities, is for ever barred, or else that he is not affected by the statute; and to avoid making so harsh a construction of the statute as to bar a person who is guilty of no laches whatever, without giving him an opportunity of making his claim, he must be considered in the same situation as if the statute had never been made.

Cent. 4. case
97. P. 192.

Judge *Jenkins* appears to have agreed with Sir *Edward Coke* on this point, for he says, “an infant, or a person “beyond the seas, or in prison is disseised, and the disseisor levies a fine of the land with proclamations, and “five years pass afterwards; they being beyond sea, “within age, or in prison, and dying under these impediments respectively: during these impediments their “heirs are not bound by the fine, for they are excepted, “and there is no provision made in the exception, that the “said heirs shall enter, or claim, or bring their action “within five years after the full age or liberty of such “heirs. See the provision in case of the limitations of “actions by 21 *Jac.* 1. c. 16. for this point.”

The general intention of the statute of limitations is precisely the same with that of the statute, 4 *Hen.* 7.—In both a non-claim for a certain number of years, is declared to be a final bar, and the same exception is made in favor of persons under age, &c. But in the clause, whereby persons thus excepted are directed to make their claim, within a certain time after the removal of their disabilities, the statute of limitations runs thus: “So as “such person and persons, or his and their heir and heirs “shall, within ten years next after his and their full age, “discoverture, coming of sound mind, enlargement out “of prison, or coming into this realm, or death, take “benefit of and sue for the same, and at no time after the “said ten years.”

To this clause *Jenkins* evidently alludes in the passage above quoted, and from the difference which is observable between the two statutes, by the insertion of the words, “or death;” in the statute of limitations, he seems to have formed his opinion, and agreed with Sir *Edward Coke*;

Coke ; the insertion of these words shews that the legislature were aware of the difficulty in the statute, 4. *Hen. 7.* where the persons excepted out of the body of the act, died under their disabilities, and took care to guard against it in the statute of limitations, by express words.

Although the statute, 4. *Hen. 7.* allows infants five *Plowd. 366.* years after they have attained their full age, to make *1 Leon. 215.* their claim, yet an infant may, if he pleases, make his claim before he attains that period.

If a stranger to a fine, who was of sound mind at the time when a fine was levied, becomes nonsane, or is imprisoned the third year after the levying the fine, and continues in that situation until five years after the proclamations are made, he will not be barred by the fine ; but if a stranger to a fine goes beyond sea, or takes a husband within three years after the fine, she will be forever barred, if the five years expire before she makes her claim, because these are voluntary acts, whereas insanity and imprisonment are involuntary. *Plowd. 366. Shep. Tou. 29.*

If a person having a right when a fine is levied, and not being under any disability, is imprisoned or becomes *non compos* before the last proclamation, and continues in that state at the time when the last proclamation is made ; he shall be allowed five years from the removal of the disabilities, to make his claim. *Plowd. 375.*

If a person labours under several disabilities at the same time, as if a woman is covert, under age, of insane mind, and in prison, at the time when a fine is levied, or when a right accrues to her, and one or more of those disabilities are removed, still the five years given by the statute will not commence, until all her disabilities are entirely removed.

CHAPTER XIII.

What Persons, Estates and Interests are not barred by a Fine.

NOTWITHSTANDING the great force and effect of a fine, yet there are some particular persons, estates, and interests, to which its operation does not extend.

The King.

By the common law, no laches can be imputed to the king, and therefore no delay or omission on his part in making a claim will bar his right: from thence has arisen the maxim, *nullum tempus occurrit regi*, for the law supposes his majesty to be always busied for the public good, and therefore that he has not leisure to assert his right within the time prescribed for other persons. It follows from this principle, that the king cannot be barred by a fine, to which he is not a party, and five years non-claim, nor is his Majesty's prerogative in this instance taken away by the statute, 9 Geo. 3. c. 16. by which the king is only disabled to sue for any manors, lands or hereditaments where the right has not accrued to the crown within sixty years.

Ecclesiastical Corporations.

Ecclesiastical corporations, and in general all ecclesiastical persons, who are seised in right of their churches only, and have not an absolute estate in their possessions, being restrained from alienation by several positive statutes, are not only prohibited from levying fine, but cannot even bar their successors by their non-claim (a)

Magdalen College Case,
11 Rep. 78. b.
1 Roll. Rep.
151.
Watf. Comp.
In. 427.

Thus in the case of *Magdalen College*, one of the points was, whether the master and fellows were bound by a fine and five years non-claim; and it was resolved that the right of the college was not barred by the fine and non-

(a) This agrees with the principles of the old law, as laid down by *Bracton*. *Illud item ut videtur, observari deberet de jure et feodo ecclesie, si rector clameum non opposuerit, quod ecclesie non prejudicatur, cum fungatur vice minoris, non magis quam minori, si custodi clameum non apposuerit, lib. 5. c. 29. f. 3.*

non-claim, for the words of the statute, 13 *Eliz. c. 10.* which prohibits all ecclesiastical corporations from alienation were, "that all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, or suffered by any masters and fellows of any college, &c." so that when a fine was levied, and no claim was made for five years, there was a conveyance permitted and suffered by the master and fellows of the college; and it would have been of no effect to have prohibited the master and fellows themselves from making conveyances of their lands, if they were allowed to have a power by their permission and non-claim, to bar their successors. *Howlet v. Carpenter*, 3 *Keb. 775.* S. P. A bishop, dean or vicar, may however be himself barred by his own non-claim, as has been stated in a former chapter. *Ante p. 119.*

It is laid down by Sir *Edward Coke* as a certain principle, that no fine will bar any estate in possession, reversion, or remainder, which is not *devested* and put to a right. This position is however too general, if the words "devested and put to a right" are understood in that strict technical sense which the law annexes to them. The word "devest" signifies nothing more than a mere deprivation of the possession (*a*); but the words, "put to a right," have a much more extensive signification, for they mean, a deprivation not only of the possession, but also of the right of possession; so that where an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property. If therefore Sir *Edward Coke's* position be taken strictly, it will appear to be unsupported by any authority, for although it be necessary that an estate be *devested* before it can be barred by a fine, yet it is by no means necessary that an estate should be put to a right. *Estates not re-devested.* 6 *Rep. 106. a.* T. *Raym.* 149. 2 *Comm.* 198.

Thus is the case of *Stowell v. Zouch*, when *Stowell* was disseised by *Zouch*, his estate was merely *devested*, that is, he had only lost the actual possession, but it was not turned to a right, for he still continued to have in him, both the right of possession, and the right of property, and yet all the judges agreed that he was barred by the fine. *Ante p. 121.*

(a) *Devest*, *devestire*, is contrary to *invest*, for as *investire* signifies *possessionem tradere*, so *devestire* means *possessionem auferre*. *Cowell's Dict. 1. lib. Feud. tit. 7.*

K

This

This case and many others, which will be mentioned in the present chapter, clearly prove the general rule to be—that no estate or interest can be barred by a fine, unless it is divested out of the real owner, either before the fine is levied, or by the operation of the fine itself, that is, unless the real owner is turned out of possession of such estate or interest, and that while he continues in possession a fine will not affect him.

The case in which this principle was laid down, and Sir *Edward Coke's* expression in stating the resolution of the court shews, that this was the idea which he annexed to the words, “put to a right,” for, says he, “he who has the estate or interest in him, cannot be put to his action, entry, or claim, for he has *that* which the action, entry, or claim, would vest in, or give him :” and in another place he states this principle in the following words: “No fine levied with proclamations shall bind any but those who are put out of possession, and have but a right, for if their estate or interest be not divested out of them, but remains in them as it was *ab initio*, they need not make an entry or claim to that which never was divested.”

5 Rep. 123. b.
2. Inst. 517.

These passages fully prove Sir *Edward Coke's* meaning to have been, that no person could be barred by a fine, unless he was first turned out of possession, and had only a right of entry or action left in him, for if a person continued in possession, after a fine had been levied, he could be under no necessity of making his claim or bringing his action, because being still in possession, and not disturbed by the fine, he had already all the advantages which those remedies could procure him, and therefore it would be unnecessary to pursue them.

It follows from this principle, that a future right cannot be barred by a fine, because a person cannot be dispossessed of it.

Ante p. 102.
5 Rep. 124. b.
3 Bac. Ab.
446.

Thus in *Saffin's* case it was agreed, that although a term for years might be barred by a fine, if the lessee were, or might have been in possession, yet that so long as a lessee for years had only an *interesse termini*, he was not affected by a fine, because a man cannot be dispossessed of an *interesse termini*. But when his term commenced and he acquired a right to enter on the land, he then had such a present estate as might be divested, and which he

might

might re-vest by his entry; so that his non-claim for five years after the commencement of his term, barred him, because from that time he was out of possession.

So in the case of *Corbett v. Stone*, a term for years was adjudged not to be barred by a fine, because the person in whom it was vested was not dispossessed of it. Ante p. 104.

A man settled lands to the use of himself for life, and if he should settle a jointure on his wife, and make a lease for thirty-one years, to commence after his death, that then the trustees should stand seised to such uses. He made a lease accordingly, and then he and his wife levied a fine. It was resolved that the lease was not barred, because being a future interest, it was not divested or displaced by the fine. Edwards v. Slater, Hard. 410.

The interests of tenants, by statute merchant, statute staple, or *elegit*, cannot be barred by a fine until they have extended the lands, or pursued their rights in some other manner, for until then, they have no right to enter on the lands, and therefore cannot be put out of possession. 1 Mod. 217.

So where a man has a judgment for debt, and the debt, or before execution, aliens by fine, and five years pass; yet the creditor may still sue out execution. 1 Chan. Ca. 268. 1 Freem. 311.

Although the owner of a rent may bar it by fine, yet a rent in the possession of a third person cannot be so barred. It is the same of a right of way or common, because these being merely contingent rights, collateral to and issuing out of lands, they cannot be divested; for although a person who has a rent, right of way, or common, out of lands, be not in the actual enjoyment of them, yet by *non-user* alone, he does not cease to have a vested estate or interest therein, so that he still continues to be in actual possession, such things being mere creatures of the law, and owing their existence to the construction thereof, they are always considered to be in the possession of those whom the law adjudges to have a right to such possession. A Rent, Right of Way and Common. 5 Rep. 124, a. Bro. Ab. tit. Fine, pl. 123. Shep. Tou. 22. Cro. Jac. 60. T. Raym. 149. 1 Freem. 312. Hawk. P. C. Ch. 64. s. 45.

It should however be observed, that a rent may be divested by a disseisin; the different modes by which a man might be disseised of a rent, are very accurately explained by *Lyttleton*, because when he wrote, an *assize* was, in most cases, the only remedy for the recovery of a rent, and it only lay where the party was dis- Litt. f. 237. to 240.

seised; but disseisins of incorporeal hereditaments are only at the election and choice of the party injured, who for the sake of more easily trying the right, is pleased to suppose himself disseised; for as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

10 Rep. 97. a.
3 Comm. 170.

These principles have been recently confirmed by the court of King's Bench in their determination of the following case.

Mich. 23 G.
3. Goodright
ex Dem.

Hare v.
Board and
Jones. M. S.

In an ejectment for lands in *Surry*, the jury found a verdict for the plaintiff, subject to the opinion of the court on a case which was as follows.

Lord *Bolingbroke* being seised in fee of the premises in question by indenture of lease, dated the 1st *March* 1765, demised the same to *William Stephens* for twenty-one years, at the rent of 100*l.* which lease, by mesne assignments, became vested in the defendant *Board*. Lord *Bolingbroke*, by a second bond, dated 24th *July*, 1770, with warrant of attorney to confess judgment, in consideration of 3000*l.* became bound to the lessee of the plaintiff in the penal sum of 6000*l.* conditioned for the payment of an annuity of 500*l.* during his own life; and by indenture of the same date, Lord *Bolingbroke*, in consideration of the said 3000*l.* and as a farther security for the annuity, demised the premises in question to the lessor of the plaintiff for ninety nine years, if his Lordship should so long live, at a pepper corn rent, with a proviso, that the lessor of the plaintiff should the next day redemise the premises to Lord *Bolingbroke* for ninety-eight years and eleven months, if he should so long live, at the rent of 500*l.* which was accordingly done.

Lord *Bolingbroke*, by lease and release, dated the 9th and 10th *March* 1773, conveyed the premises, for a fair and valuable consideration, to the defendant *Jones* in fee, who had no notice of the annuity granted to the lessor of the plaintiff.

Jones being in possession, levied a fine of the premises, with proclamation in *Trinity Term* in 1775, to the use of himself in fee.

The annuity was in arrear from the 24th *January* 1774, and the ejectment was brought in *Hilary Term* 1782.

Lord

Lord Mansfield—We have looked into all the cases, and have no doubt. It appears that the lessor of the plaintiff and the defendant *Jones* are both innocent; *Jones* is a purchaser for a valuable consideration, without any notice of the lessor of the plaintiff's title; the lessor of the plaintiff is not alleged at any time to have known of the conveyance to *Jones*, and there was no circumstance of notoriety attending the transfer to give her such notice; for the visible possession continued the same after the sale as before it; the lease to *William Stevens* subsisting, and the payment of rent to *Jones*, instead of Lord *Bollingbroke*, carried with it no notoriety in the country. At the time of the conveyance there was no arrear of interest due to Mrs. *Hare*, and therefore she had no right to come upon the land in any shape. If she was guilty of *laches* afterwards, there could be no *mala fides* in it with respect to *Jones*, as he is under no disadvantage from it: so that it is a question of mere law between two innocent parties, whether the right and interest of the lessor of the plaintiff is barred by the fine and non-claim. This depends on one clear proposition, which is a general rule of law founded in good sense; and although it be difficult to find a rule without an exception, yet I know of none to this proposition. It is laid down in 9 *Co. Rep.* 106. a. "Resolved *per totam curiam*, that no fine nor warranty shall bar any estate "in possession, reversion, or remainder, which is not "divested and put to a right." This general rule is illustrated and applied to several cases throughout the books; and hence it follows, that no collateral interest can be barred by a fine, as a rent charge, a right of common, &c. and the authority cited from *Carter* 24, that a rent charge may be barred by a fine, is totally mistaken; for, in looking into it, it appears to be thus, the owner of a rent charge levied a fine of the land, the question was, whether the rent charge passed by the fine, and a distinction was taken between a fine's operating as a grant or as a bar. Here the fine operated as a grant, and not as a bar; the rule is universal, that a rent charge in a third person is not barred by a fine and non-claim. Hence the parties to a fine, or one of them, must be in, of a seisin or possession adverse to that interest which is to be barred; for, if it be consistent with it, the fine does not divest it, and therefore is no bar. Now, at the time of

of the conveyance to *Jones* in 1773, Lord *Bolingbroke* had no adverse possession; he had paid all arrears, and as the lessor of the plaintiff had no right to come on the land but for arrears, she had then no title in her. At the time when the fine was levied, there was an arrear of a year and a half due; but the lessor of the plaintiff was not bound to resort to the lands for her remedy, she had other securities; besides, she could not enter on the lands, the lessee for years being in possession; all she could do was by notice to the tenant under the statute 4 and 5 *Anne*, c. 16. which makes attornment unnecessary, either to distrain or bring an action for the rent. In every shape it is most clear, that the lessor of the plaintiff's interest was not divested or turned to a right; and therefore that it remained after the fine just as it did before. Judgment was given for the lessor of the plaintiff.

Gilb. Ten.
104.

The doctrine, that a rent cannot be divested, seems to extend to the case of a rent in the possession of a person who has no title to it; for it is said by Lord Chief Baron *Gilbert*, that if *A.* is seised of a rent charge, and the tenant of the land pays it to *B.* this does not divest *A.* of his right, because the wrongful payment of a tenant cannot alter the right of the owner, it is therefore a payment in his own wrong, and it still remains in arrear. This seems the strongest case that can be put on the subject.

*Remainders
and Reversion
expectant
on an Estate
Tail which is
not discontinued.*

No remainder or reversion expectant on an estate tail can be barred by a fine, unless such estate tail is discontinued, because until then no estate is divested; so that the persons in remainder or reversion continue in possession of their respective estates, and therefore are not affected by the fine.

1 Inst. 325. a.
Note 1.

A discontinuance of an estate tail, is such an alienation of the possession by the tenant, as bars the entry of the issue in tail, and also that of the persons in remainder and reversion, and puts them to their action: by such alienation, the estate, together with the remainders and reversion expectant thereon, are divested and put to a right, and a mere entry is not sufficient to re-vest them, as in the case of a disseisin, but the persons who have a right to the land, are driven to their possessory action.

1 Rep. 44.

An estate may be discontinued by five different modes of conveyance, a feoffment, fine, recovery, release, and confirmation

confirmation with warranty. But no person can create a discontinuance, who is not in the actual possession of the estate tail by force of the entail. It should however be observed, that there can be no discontinuance of things lying in grant; so that if a tenant in tail of a rent, advowson, or common, levies a fine, or makes a feoffment with warranty, there is no discontinuance; for nothing passes but during the life of the tenant in tail, which is lawful; and as no injury is done to the issue in tail, the remainder man or the reversioner, there is no discontinuance.

Inst. 332. b.
Rep. 85.

Where the original conveyance of an estate is not by fine, but it is only levied as a confirmation of some prior conveyance, it will not in that case operate as a discontinuance, or take away the entry of the remainder man,

Thus where Lord *Cheney* being tenant in tail, with remainder in tail to *John Cheney*; Lord *Cheney* conveyed the premises by bargain and sale, inrolled, to *William Higham* and his heirs, by force whereof he entered and was seised; and, in a year afterwards, he levied a fine, with proclamations to the said *Higham* and his heirs, with general warranty. Lord *Cheney* died without issue, and *John Cheney*, the remainder man in tail, entered upon the premises; the question was, whether his entry was lawful or not.

Seymour's
Case,
10 Rep. 95.

It was resolved that the entry of *John Cheney* was not taken away by the fine, because it did not discontinue the estate tail, but only operated as a confirmation of the estate of the bargainee, which was originally determinable on the death of the tenant in tail; whereas the fine confirmed it as long as the tenant in tail had heirs of his body. It was agreed, that if the fine had been levied before the bargain and sale was executed, it would have discontinued the estate tail, and divested the remainder and reversion, by which means the entry of *John Cheney* would have been taken away; but the estate tail not being discontinued, the remainder was not divested or turned to a right, so that *John Cheney* still continued in possession of it, and therefore the bar was no bar to him.

But where a fine is levied, in pursuance of a covenant in a prior conveyance of an estate tail, as where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly:

ingly: in that case, the lease and release and fine will be considered as one assurance, and will therefore operate as a discontinuance of the estate tail.

Doe ex Dem.
Odiarne
v. Whitehead,
2 Burr. 704.

Thus where a tenant in tail male, with remainder over in fee, in consideration of a marriage, conveyed his estate tail by lease and release to trustees and their heirs, to several uses, and in the release he covenanted to levy a fine to the same uses. The marriage took effect, and the tenant in tail levied a fine pursuant to his covenant.

On the death of the tenant in tail without issue, the remainder man in fee made an actual entry upon the lands to avoid the fine, and then brought his ejectment.

The question was, whether the plaintiff could maintain an ejectment.

It was contended that an ejectment might be maintained, unless a discontinuance could be proved; that from the authority of *Seymour's case*, the fine did not operate as a discontinuance, because it passed no freehold, the freehold having been conveyed by the lease and release before the fine was levied; which therefore only operated as a confirmation of the preceding estate.

But the court of King's Bench were unanimously of opinion, that the lease and release and fine operated as one assurance, and divested the remainder in fee; so that the plaintiff could not maintain his ejectment, but was put to his formedon, because the operation of the deed and fine ought not to be divided and considered distinctly, as that would defeat the intention of the parties, and overturn a great number of family settlements: that the deeds of lease and release were incomplete until the fine was levied, and only operated as a declaration of the uses of the fine; so that the estate tail passed by the fine. That this case was quite different from *Seymour's*; for in that case Lord *Cheney* did not levy the fine until a year after the bargain and sale was enrolled; and it was expressly found by the verdict, that the bargainee entered, and was seised by force of the bargain and sale only; so that the bargain and sale was totally unconnected with the fine: nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

Necessity of an
adverse Possession.

It is not only necessary that a person should be out of possession to be affected by a fine, but it is also requisite that

that the party levying the fine should have an adverse possession inconsistent with that of the person to be barred; so that if the possession of the party who levies a fine is consistent with that of any other person, such other person will not be affected by it.

Thus it has been settled, that the possession of one joint-tenant is the possession of the other, so as to prevent the effect of the statute of limitations, and that where there are two joint-tenants in fee, if one of them levies a fine of the whole, it does not amount to an ouster of his companion, but only severs the jointure though he is in of the old use again. Ford v. Lord Grey, 9 Mod. 44. Salk. 285.

The possession of one tenant in common is the possession of the other, nor does the bare perception of all the rents and profits by one, amount to an ouster of the other, so as to make him liable to be barred by the statute of limitations.

Thus where one tenant in common received all the rents for twenty-six years, and in an ejectment brought by the other tenant in common for the recovery of his moiety, the only question was, whether the plaintiff was barred from recovering by the statute of limitations. It was said on behalf of the plaintiff, that the statute of limitations only runs against those who are out of possession, that coparceners, joint-tenants, and tenants in common have a joint-possession, and the possession of one is the possession of both; that the perception of the profits does not amount to an expulsion, one tenant in common may indeed disseise another, but then it must be done by an actual disseisin, and not by a bare perception of the profits only, and the statute of limitations never runs against a man but where he is actually ousted or disseised. The court laid it down that there must be an adverse possession, in order to enable the statute of limitations to run, that there must be a disseisin strictly proved, that in this case there was no adverse possession, no keeping the plaintiff out of possession; one tenant in common had received the rent without accounting for it to the other, but there was no expulsion, no ouster. Judgment was therefore given for the plaintiff. Fairclain v. Shackleton, 5 Burr. 2604.

Notwithstanding the doctrine established in the preceding case, it has since been determined that thirty-six years sole and uninterrupted possession by one tenant in common,

Doe v.
Proffer,
Cowp. 217.

common, without any account, or demand made, or claim set up by his companion, was a sufficient ground for a jury to *presume* an actual ouster of the co-tenant.

Thus where upon a rule to shew cause why a new trial should not be granted; Lord *Mansfield* reported that from the year 1734 one tenant in common had been in the sole possession of the lands without any claim or demand, by any person or persons claiming under the other tenant in common; that no actual ouster was proved: but upon the circumstances his lordship had left it to the jury to say, whether there was not sufficient evidence before them to presume an actual ouster, and supposing there was an actual ouster, in that case, the lessors of the plaintiff were barred by the statute of limitations. The jury found that there was sufficient evidence to presume an actual ouster. After the case had been argued, Lord *Mansfield* said, "It is very true that I told the jury, they were warranted
" by the length of time in this case, to presume an *ad-*
" *verse* possession and *ouster* by one of the tenants in
" common of his companion; and I continue still of the
" same opinion.—Some ambiguity seems to have arisen
" from the term *actual ouster*, as if it meant some act ac-
" companied by real force, and as if a turning out by
" the shoulders were necessary. But that is not so, a
" man may come in by a rightful possession, and yet
" hold over *adversely* without a title. If he does, such
" holding over, under circumstances, will be equivalent
" to an *actual ouster*. For instance, length of possession
" during a particular estate, as a term of 1000 years, or
" under a lease for lives, as long as the lives are in being,
" gives no title. But if tenant *pur autre vie* hold over
" for 20 years after the death of *cestui que vie*, such hold-
" ing over will in ejectment be a complete bar to the re-
" mainder-man or reversioner; because it was *adverse* to
" his title. So in the case of tenants in common, the
" possession of one tenant in common, *eo nomine*, as te-
" nant in common, can never bar his companion; be-
" cause such possession is not adverse to the right of his
" companion, but in support of their common title;
" and by paying him his share, he acknowledges him
" co-tenant. Nor indeed is a *refusal* to *pay* of *itself* suffi-
" cient, *without denying* his title. But if upon demand
" by the co-tenant of his moiety, the other *denies to pay*,
" and

“ and *denies his title*, saying, he claims the whole and “ will not pay, and continues in possession; such possession is adverse and *ouster* enough.” The court was of opinion, that an undisturbed and quiet possession for such a length of time, was a sufficient ground for the jury to presume an actual ouster, and therefore the rule for a new trial was discharged.

It is said by Sir *Edward Coke*, that when one coparcener enters claiming the whole land and taking the whole profits, she gains the moiety of her sister by abatement, which is thereby divested, and yet her dying seised will not take away the entry of her sister; that when one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of them both, and will not divest the moiety of her sister; but if both coparceners enter, the taking of the whole profits, or any claim made by the one cannot put the other out of possession without an actual putting out or disseisin; from which it follows, that if one coparcener enters generally, and takes the whole profits, and afterwards levies a fine of the whole, such fine will not bar her companion, because there was no ouster, and of consequence no adverse possession: for there is a strict analogy between the effect of the statute of limitations, and that of the statute of 4 *Hen. 7.* in this respect: both these statutes enact that a non-claim during a certain period of time, is a complete bar to those who are out of possession, that is, to those who are either ousted or disseised, but with respect to such persons as are in actual possession, or whose possession is preserved by the possession of some other person on account of a privity of estate they are not barred.

This doctrine, however, is not supported by any adjudged case respecting the fine of one coparcener, but the rule laid down by the court in the case of *Ford v. Lord Grey*, that the fine of one joint-tenant does not amount to an ouster of his companion, seems to be a sufficient authority for concluding, that the fine of one tenant in common, or one coparcener, would not be considered as a bar to his companion, as the principle is precisely the same in all those cases, unless there were acts of ownership from which an actual ouster might reasonably be presumed.

Thus

Davenport v.
Tyrrell,
2 Black. R.
675.

Thus where in a writ of error from the court of King's Bench in *Ireland*, the case was, that *Maurice Tyrrell* being a Roman Catholick, died seised of certain lands, leaving two sons, *Richard* and *James*. By the *Irish* statute 2 *Anne*, estates in fee simple, or fee tail, belonging to Roman Catholicks, descend in gavelkind, but on the death of *Maurice* his eldest son, *Richard* entered alone, and held the same until his death; for sixty-two years, and in the mean time settled the same by fine and recovery, to which *James* his brother was privy. On the death of *Richard*, in 1766, leaving two daughters, *James* the lessor of the plaintiff, brought an ejectment against his two nieces, for two thirds of the moiety of the lands whereof his brother died seised, as co-heir in gavel-kind with his brother, and recovered them by default. He then brought an ejectment against the widow of *Richard* for the other third of the moiety, which she claimed as her dower, and also under the settlement. On the trial the judge directed the jury to find a verdict for the plaintiff, upon which a bill of exceptions was tendered, setting out in substance this case, which was returned into the King's Bench in *Ireland*, and thereupon the court gave judgment for the defendant. A writ of error was then brought in the King's Bench at *Westminster*, and it was argued for the defendant, that sixty-two years sole possession, and the fine were a bar to this action by common law: that this was a question, not between joint-tenants, or tenants in common, but tenants in gavelkind, who are male coparceners; that the true state of the law was this, 1. If both enter, there must be actual ouster, to make a disseisin. 2. If one enters generally, and takes the profits, this is no disseisin. 3. If one enters specially, as in the present case, claiming right to the whole, and taking the whole profits, this is a disseisin; but after her death the sister may enter, unless barred by the statute of limitations. 4. If after a special entry, one by feoffment or fine, destroys the coparcenary, and takes back an estate in fee and dies, the entry of the sister is barred.—Here *Richard* entered alone in 1704; took the whole profits, settled the estate in 1727, with the privy of *James*, levied a fine, and died after sixty-two years possession. The entry of *James* is therefore clearly barred, and he cannot maintain an ejectment. The court

court said that the statute 2 *Anne* made the lands of Roman Catholicicks descend in gavelkind, that was its whole effect, and then the adverse possession of one gavelkind tenant, would not operate as the possession of both.— That was a qualified rule, and in the present case the acts of ownership, fine, &c. made an actual ouster, the statute of limitations operated as an extinguishment of the remedy of the one, and not as giving the estate to the other.

It is impossible from these cases to deduce any certain rule respecting the operation of fines levied by joint-tenants, tenants in common, or coparceners; for if we adopt the principle laid down by Sir *Edward Coke*, no fine levied by a joint-tenant, &c. will bar his companion, 1 Atk. 631. unless it be proved that such joint-tenant entered specially, claiming the whole; a fact not easily ascertainable, and which can only be decided by a jury. But there is another passage in *Coke's* comment on *Littleton*, where it 1 Inst. 374. a. is said that—“when one coparcener entereth into the whole, and maketh a feoffment of the whole, this doth vest the freehold in law out of the other coparcener.”—Now a fine has certainly as powerful an operation in divesting an estate, as a feoffment; and if this rule be adopted, it will follow, that a fine levied by one joint-tenant, &c. will divest the estate of his companion, and of consequence bar it, unless a claim is made in due time. A distinction may however be made between a fine levied of the whole estate by one joint-tenant, &c. without any declaration of use; and a fine levied of the whole estate by one joint-tenant, &c. for the purpose of conveying it to a purchaser. In the first case, it may be presumed that the joint-tenant, &c. only levied the fine in order to strengthen his own and his companion's title; but in the second case, the act of levying the fine is sufficient evidence of an intention of claiming the whole profits, and therefore the possession must necessarily become adverse from the time when such a fine is levied. 1 Atk. 632. And even in the case where both the joint-tenants, &c. have entered and been seised, the levying a fine by one of them to a stranger, of the whole estate, seems to amount to an actual putting out.

When fines became common assurances of lands, the *Estates Tail of* judges would no more allow a fine to divest the interest *the Gift of the* of *Crown*.

of the king, than any other conveyance, but preserved the king's remainder or reversion, although they allowed the fine to be a good bar to the estate tail, on which the king's remainder or reversion depended, for otherwise an estate tail, with a remainder or reversion in his majesty, would have been unalienable; and if a fine was levied of an estate of this kind, it only passed a base fee, determinable on failure of heirs of the body of the tenant in tail.

But by a clause in the statute 32 *Hen. 8. c. 36. f. 4.* it was provided that, "that statute should not extend to
 " any fine levied by any person or persons, of any manors, lands, tenements, or hereditaments before the
 " time of levying the same fine given, granted, or assigned to the said person or persons so levying the
 " same fine, or to any of his or their ancestors in tail, or
 " by virtue of any letters patent of the king, or any of his
 " progenitors, or by virtue of any act or acts of parliament, the reversion whereof at the time of the said
 " fine or fines so levied, being in the king, his heirs or
 " successors: but that every such fine and fines, should
 " be of like force, strength, and effect, as they were or
 " should have been if that act had never been had or
 " made."

In consequence of this proviso the operation of fines levied by tenants in tail, where there was a remainder or reversion in the crown, depended on the statute 4 *Hen. 7.* and it was much doubted whether the issue in tail were barred or not. But on account of a statute made two years after 34 & 35 *Hen. 8. c. 20.* it was resolved, that no fine levied by a tenant in tail, where there was a remainder or reversion in the crown, should operate as a bar to the issue in tail, or should affect the remainder or reversion, which was in the crown.

With respect to the construction of the statute 34 & 35 *Hen. 8.* and the cases which have been determined on it, they will be stated in the essay on recoveries.

Springing and shifting Uses.

A springing or shifting use cannot be barred by a fine, levied of the estate out of which such springing or shifting use is to arise.

Lloyd v. Carew, Show. Cases in Parl. 137.

Thus where *Mary* and *Penelope Tannott* being seised in fee as co-heirs, in consideration of 4000*l.* paid to *Mary* by *Richard Carew*, and of a marriage, which soon afterwards

wards took place between *Penelope* and *Richard Carew*; the said *Mary* and *Penelope* conveyed all their estates to trustees and their heirs, to the use of *Richard Carew* for life, remainder to *Penelope* for life, for her jointure, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *Richard* and *Penelope* in tail male successively, remainder to the daughters in tail, with the ultimate remainder to the said *Richard Carew* and his heirs for ever. Subject to a proviso, that if it should happen that no issue of the said *Richard* by the said *Penelope* should be living at the decease of the survivor of them, and the heirs of the said *Penelope* should, within twelve months after the decease of the survivor of the said *Richard* and *Penelope*, dying without issue as aforesaid, pay to the heirs or assigns of the said *Richard Carew* the sum of 4000*l.* that then the remainder in fee simple so limited to the said *Richard Carew* and his heirs should cease, and that then and from thenceforth, the premisses should remain to the use of the right heirs of the said *Penelope* for ever. Afterwards *Richard Carew* and *Penelope* his wife, in order to extinguish and destroy all such right as the heirs of *Penelope* might have under this proviso, and for settling the same on the said *Richard Carew* and his heirs, levied a fine of all the estate, and declared the uses thereof to *Richard Carew* for life, remainder to *Penelope* for life, remainder to *Richard Carew* in fee. *Richard Carew* died without issue; upon which the heirs of *Mary* claimed the estate under the proviso, and filed their bill in chancery, to compel the trustees to convey the estate to them, on payment of the 4000*l.* The bill was dismissed; but upon an appeal to the house of lords, the decree of dismissal was reversed, it being alledged that this proviso was within the same reason with those limitations which were allowed in the duke of *Norfolk's* case, where it is said that future interests, springing trusts, or trusts executory, and remainders to arise upon future contingencies, are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will speedily wear out. And that the fine could not bar the benefit of this proviso, because the same never was, nor could be in *Penelope*, who levied the fine.

A Title of Honour.

Show. Cases
in Parl. 1.

Collins's
Claims of

Baronies, 293.

1 Inst. 20. a.
note 3.

18 JUNE, 1678.

Fines seem formerly to have been in some instances levied of dignities and titles of honour, but in the case of Lord Viscount *Purbeck*, it was debated in the house of lords, whether the dignity of a Viscount could be surrendered to the king by a fine. And the house of lords, after long debate, and having heard his majesty's attorney-general, were unanimously of opinion, that no fine levied to the king can bar a peer's title of honour, or the right of any person claiming such title under a person levying such a fine.

CHAPTER XIV.

Of some other Effects of a Fine.

THE operation of a fine frequently depends on the particular situation of the cognizor, or cognizee, respecting the property of which it is levied. Thus if one joint-tenant levies a fine to his companion, it will operate by way of release. *A Fine sometimes operates as a Release.*

John Stile and Susan, a feme-sole, were joint-tenants for life, *Susan* married, and she and her husband granted by fine to *John Stile*, *tenementa prædicta et totum et quicquid habent pro termino vite prædictæ, Susan, &c.* the question was, whether this fine should enure by way of a grant, or of a release, and it was resolved that the fine should enure by way of a release. *Eustace v. Scawen, Cro. Jac. 696.*

But if one coparcener in tail levies a fine to another, *1 Inst. 200. sur cognizance de droit, &c.* it does not enure by way of release, but by way of grant, and it will be a discontinuance and alteration of the estate, without execution; because one coparcener may enclose another, and a fine is a feoffment of record. *b. note 1.*

A fine sometimes operates as a confirmation of a former estate which was before defeazible. *Confirmation.*

Thus if a tenant in tail bargains and sells his estate tail in fee, and then levies a fine to the bargainee, the fine will operate as a confirmation of the estate which passed by the bargain and sale. *Seymour's Case, ante p. 135.*

So if a tenant in tail confesses a judgment, makes a lease or mortgage, or incumbers his estate in any other manner, and afterwards levies a fine, it will operate as a confirmation of all his prior charges and incumbrances. *1 Rep. 48 b. 2 Roll. Ab. 473. 1 Ab. Eq. 257. 3 Bac. Ab. 314.*

In the same manner where a tenant for life, and the remainder-man in tail, join in granting a rent-charge in fee out of the land, and afterwards join in levying a fine to any other person, the rent which was before determinable will be confirmed by the fine. *Holbeach v. Sambeach, Winch. 102.*

The operation of a fine levied by a tenant in tail who has the immediate reversion in fee in himself, is to merge the tail, lets in the

*the Reversion
in Fee, and
makes it liable
to prior In-
cumbances.*

the estate tail, and bring the reversion in fee into immediate possession, by which means it will become liable to the incumbrances of all those who were seised of it. So that if a tenant in tail with the immediate reversion in fee in himself, makes a lease, acknowledges a judgment, or incumbers his estate in any other manner, and his heir levies a fine, it will operate as a confirmation of the lease or judgment.

Symonds v.

Cudmore,

1 Show. 370.

1 Salk. 338.

4 Mod. 1.

Carthew 257.

Thus where a person who was tenant in tail, with remainder to himself in fee, made a lease to commence *in futuro*, and died before the time when it was to commence, leaving issue a son, who some time after the death of his father, and before the commencement of the lease, levied a fine.—It was agreed by the whole court, that the remainder in fee was chargeable with the lease, and that it would have been a good charge on the remainder in fee, in case the tenant in tail had died without issue. It was also held, that the estate tail was extinct by the fine, as much as if the tenant in tail had died without issue.—1. Because two estates in fee immediately expectant one upon another cannot subsist in the same person.—2. Because by the statute 32 *Hen. 8.* a fine is declared to be a bar and discharge of the estate tail.—3. Because the statute of *Westminster 2.* having made estates tail a kind of particular estate, when the protection of that statute is taken away by the fine, they are, like all particular estates, subject to merger and extinguishment, when united with the absolute fee.

*Earl of Shel-
burne v.
Biddulph,
& Brown,
974.*

This doctrine is further confirmed by the following case.—*Charles, Lord Shelburne*, being tenant in tail male of the lands in question, with remainder to his brother *Henry* in tail male, remainder to his own right heirs; demised them for three lives, with covenants for perpetual renewal. *Charles, Lord Shelburne*, died without issue, by which means his brother *Henry* became intitled to an estate in tail male in the premises, with the reversion in fee in himself. In the year 1697, *Henry, Lord Shelburne*, levied a fine of those lands, and in consideration of his marriage settled them on himself for life, with remainder to his first and other sons. The lessees having claimed a renewal on the death of some of the persons for whose lives the leases were granted, *Henry, Lord Shelburne*, refused to renew, alledging, that as his brother

brother *Charles* was only tenant in tail of the lands comprised in those leases, he had no power to make them, and that he was not bound by the covenants for renewal.

The court of Exchequer in *Ireland* decreed, that *Henry*, Lord *Shelburne* should renew those leases. From this decree there was an appeal to the House of Lords, and on behalf of the appellants it was argued, that tenant in tail at law, independent of the statute 32 *Hen.* 8. had no right to make a lease absolutely to bind the issue in tail, and much less the remainder-man : and that even by that statute, a tenant in tail has no power to grant leases to bind those in remainder, and therefore the leases in question were absolutely void, as against the appellant, who did not claim under Lord *Charles*, or as issue in tail, but as remainder-man. That the estate tail out of which the leases first arose being spent, and the appellant not claiming under it, but by a distinct limitation to himself in tail male, his fine could not let in Lord *Charles's* leases upon that estate, which came in lieu of the Earl's estate tail ; nor could it by consolidating the two estates, let them in upon the reversion ; both because the Earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement, by which, in consideration of his own marriage, the Earl had an estate for life only, with remainder to his first and other sons ; and these estates arose and were granted out of the estate tail which the Earl had before the fine, and not out of the reversion. On the other side it was contended, that by the fine which, Earl *Henry* levied in 1697, the estate tail limited in remainder to him was barred and extinguished, in the same manner to all intents and purposes, as if he was dead without issue : and the reversion in fee which descended to him as heir of Lord *Charles*, immediately took effect, in possession. And as the new uses in the marriage-settlement of 1697, arose out of that reversion in fee, they were therefore subject to all antecedent incumbrances and engagements which could affect that reversion. That as this reversion in fee, after it had taken effect in possession by means of the fine, was specifically bound by the covenants for perpetual renewal ; and as such covenants are considered as real agreements and go with the land, so they are in their

nature proper for a specific performance, and would in equity affect the legal interest of all those, who take the estate with notice of them. That all those claiming under the settlement of 1697, had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands, as Earl *Henry* himself, especially in favour of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal.—After hearing counsel on this appeal, the following question was put to the judges, viz. “whether by the fine levied by the appellant the Earl of *Shelburne*, in Easter term, 1697, the reversion in fee of the estate in question was let in, subject to the leases in question, made by *Charles*, Lord *Shelburne*, and the covenants therein contained for a perpetual renewal?” And the Lord Chief Justice of the King’s Bench having delivered the unanimous opinion of the judges to this effect, viz. “that the leases for lives now in being were good and effectual, as being served out of the reversion in fee, which Lord *Charles* had when he made them, and which was now in Lord *Henry*; and that the covenants for renewal, were binding on Lord *Henry*, as a lien on the same reversion, which he had let in by barring, discharging, and extinguishing his estate tail:” it was therefore ordered and adjudged that the appeal should be dismissed, and the decree therein complained of, affirmed.

In the same manner where a person is tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, and becomes indebted by bond, or incumbers the estate in any other manner: if after the death of such a tenant for life, his son levies a fine, it will let in the reversion in fee, and make it liable to all his father’s incumbrances.

Kinaston v.
Clark,
2 Atk. 204.

Thus, where *Thomas Delahay* on his marriage, settled his estate on himself for life, remainder to his wife for life, remainder to his first and other sons in tail male, remainder to himself in fee. There was issue a son. *Thomas* the father died, indebted by bond, and the son afterwards died without issue.—The question was, whether the reversion in fee, which was come into possession, should be assets to pay the bond-debt of the father. Lord *Hardwicke* was of opinion that this reversion was assets, and his Lordship said, “indeed the son might have suffered

“fered a recovery, and barred the reversion in fee, and
 “there the father’s creditors would not have come in;
 “if he had levied a fine only, it would have barred the
 “estate tail, but the reversion in fee would have been
 “liable.”

A fine being a judgment obtained by consent in a fictitious suit, and recorded in a court of justice, all those who are parties to it, and their heirs, are for ever concluded from averring or proving any thing against it, and therefore it operates towards them as an estoppel upon record.

Thus, although a fine levied by persons who have not an estate of freehold in the lands, is void as to all strangers; yet it will operate as an estoppel against all the parties to it. So if two persons are seised in fee, and a stranger levies a fine to them, and to the heirs of one of them, the other will be thereby estopped from claiming any thing more than an estate for life in the lands.

A contingent remainder may, before it vests, be barred by a fine, which will operate as an estoppel, so as to bind the interest that may afterwards accrue by the contingency.

Thus where *A.* made a feoffment to the use of himself for life, and after the death of himself and *M.* his wife, to the use of *B.* his eldest son for life, and after the death of *A. M.* and *B.* to the use of *B.* and the heirs males of his body; and for default of such issue to the use of the right heirs of *B.* *B.* had issue a daughter, and then by fine and deed granted the premisses to *D.* for five hundred years, to commence after the death of *A.* *B.* died, *M.* died, and *A.* survived. It was held that the estate limited to *B.* was a contingent remainder, for the particular estate was only for the life of *A.* whereas *B.*’s estate was not to commence till after the death of *A.* and *M.* and although *B.* levied the fine for five hundred years, and died before the contingency happened on which his remainder was to arise, yet, when the contingency did happen, his heir was bound by the fine, and the term for five hundred years limited by the deed to *D.* took place; for it was agreed, that the contingent remainder descended to his heir, that the fine operated from the beginning by conclusion, and although it passed no interest,

Went v. Lower,
Pollex. 54.
Fearne 287.

terest, yet that it should operate as an estoppel and bind the heir.

Vick v. Edwards, 3 P. Wms. 372.
Vide Fearn 283.

1 Inst. 191. a. n. 1.

So where lands were devised to *A.* and *C.* and the survivor of them, and the heirs of such survivor, in trust to sell, the estate was decreed to be sold; and it being referred to a Master to see whether the parties could make a good title, the Master reported, that the parties could not make a good title, there being no fee simple in the trustees; for the remainder in fee was contingent, it being uncertain which of the two trustees would be the survivor. Exceptions being taken to the Master's report, the Lord Chancellor held, that the trustees, by levying a fine, could make a good title to a purchaser by estoppel; and his Lordship cited the case of *Weale v. Lower*, where a fine was adjudged to pass an estate not vested by way of estoppel, and to convey an interest which accrued afterwards.

Forfeiture.

1 Inst. 251. b. Gilb. Ten. 38.

9 Rep. 106. b.

Where a person who is only tenant for life, levies a fine *sur cognizance de droit come ceo, &c.* it will operate as a forfeiture of his estate, because it is an attempt to create a greater estate than he can lawfully convey, and a renunciation of the feudal connection between the tenant and his lord. So if a tenant for life accepts a fine *sur cognizance de droit come ceo, &c.* It is also a forfeiture of his estate for life, for it is a denial of the tenure upon two accounts: 1. In admitting the reversion to have been in a stranger to convey: and 2. In accepting of it himself, to the prejudice of the person in reversion.

1 Inst. 251. b. Watf. Com. Incum. 106. 10 Vin. Ab. 374.

If a tenant for life of a rent or advowson levies a fine, it will have the same effect, for although the fine being levied of a rent passes no more than it lawfully may, yet being a public and solemn renunciation of the estate for life in a court of record, it is within the reason of the law, and amounts to a forfeiture.

2 Lev. 202. Smith v. Abell. Co. Read. 3.

If *A.* be tenant for life, with remainder to *B.* for life, and *A.* levies a fine to *B.* this is a forfeiture of both their estates; for by their own act on record, they have denied the reversion to be in the lord, the one by giving, and the other by receiving it.

Garrett v. Blizard, 1 Roll. Ab. 355.

So where *A.* was tenant for life, remainder for life to *B.* remainder in tail to *C.* remainder in fee to *B.* and *B.* levied a fine *sur cognizance de droit come ceo, &c.* to a stranger. It was adjudged to be a forfeiture of his remainder

mainder for life, so that after *A.*'s death, *C.* might enter, because the fine conveyed a fee simple in possession by estoppel, against which he could not aver that he only passed an estate for life *in presenti*, with a fee simple, expectant on the death of *C.* without issue; because the fine supposes a prior gift in fee simple, which he could not lawfully make while the estate for life of *A.* and the intermediate remainder of *C.* in tail were subsisting.

But where the person who has the next estate of inheritance joins with the tenant for life in levying a fine *sur cognizance de droit come ceo*, it does not then operate as a forfeiture. Bredon's Case, 1 Rep. 76. 1 Vent. 160.

Thus where *A.* being tenant for life, with remainder in tail to *B.* they both joined in levying a fine *sur cognizance de droit come ceo* to a stranger in fee. It was resolved that this was neither a discontinuance nor a forfeiture, but that each of the parties to the fine gave that which he might lawfully dispose of, and that the law would construe it to be first the grant of the person in remainder, and afterwards the grant of the tenant for life.

A fine *sur concessit* levied by a tenant for life, does not operate as a forfeiture of his estate, because it only transfers such an interest as the tenant for life may lawfully pass, without divesting or displacing the estates in remainder or reversion. Pigott v. Sa-lisbury, 2 Mod. 109. Cro. Jac. 200.

No fine levied by a *cestui que trust* will be allowed in Chancery to operate as a forfeiture, because it cannot affect the subsequent remainders; and therefore such a fine will in equity operate at most, as a grant of the interest of which the *cestui que trust* has a power to dispose. 3 P. Wms. 146. 3 Atk. 729.

If a copyholder levies a fine of his copyhold it will operate as a forfeiture, and no subsequent act of the lord can dispense with it. Co. sup. ch. 11.

A fine will in general operate as a revocation of a prior devise of the lands whereof the fine is levied, because it is an established maxim, that any alteration of the possession or estate by the act of a deviser, after the publication of a will, amounts to an implied revocation of it, as such alteration is considered as evidence of a change of intention. Revocation of a Devise, Roll's Ab. Tit. Devise, O. p. 3.

There are however some alterations in the nature of an estate which do not operate as a revocation of a devise, and

and where a fine is levied only for the purpose of confirming such an alteration, it will not in that case operate as a revocation.

Luther v.
Kirby,
8 Vin. Ab.
p. 148.
3 P. Wms.
169.

Thus where *Dorothy Kirby* by her will, taking notice that she was tenant in common with another person, devised her moiety to trustees upon several trusts. She afterwards by indenture between her and the other tenant in common covenanted to levy a fine of all the premises, and declared the uses thereof as to one moiety to herself and her heirs, and as to the other moiety to the other tenant in common and his heirs, and the fine was levied accordingly.

A question having arisen, whether this deed and fine operated as a revocation of the will, the Lord Chancellor referred it to the judges of the court of King's Bench, who were unanimously of opinion that they were not a revocation, with which the Lord Chancellor agreed, and decreed accordingly.

But where a partition is made and a fine is levied, not merely to establish the partition, but also for another purpose, and the estate in the land is altered, it will then operate as a revocation of a former devise.

Tickner v.
Tickner,
cited, 3 Atk.
742.

Robert Tickner being seised in fee of the estate in question which was held in gavelkind, died intestate, and left two sons *Henry* and *Robert* who entered and became seised in gavelkind. *Robert* being seised of an undivided moiety, made his will, and devised it to his wife and her heirs. Afterwards by deed of partition and fine between *Robert* and *Henry*, all the estate which *Robert* had devised was allotted to him, to such uses as he should by deed or writing appoint, and in default of appointment to him in fee. After mature deliberation Lord Chief Justice *Lee* held this transaction to be a revocation of *Robert's* will; and Lord *Hardwicke* says of this case, that there was a new conveyance, and it did not rest upon the partition only.

3 Atk. 745.
750.

CHAPTER XV.

How Fines may be reversed and avoided.

A Fine being considered as a judgment given in a court *Writ of error.* of record, it can only be reversed by a writ of error, which is also a matter of record, being a commission to judges of a superior court, authorising them to examine the record upon which a judgment was given, and on such examination, to affirm or reverse the same according to law. *Interest republicæ res judicatas non rescindi, et nihil est tam conveniens naturali æquitati, quam unumquodque dissolvi, eo ligamine quo ligatum est.* ^{2 Inst. 360.}

During the term in which a judicial act is done, the record may however be amended or invalidated, without a writ of error; because during the term the record is in the breast of the court, and the rolls are alterable at the discretion of the judges; and now the courts of justice will allow amendments to be made at any time, while the suit is depending, notwithstanding the record be made up, and the term be past; for they consider the proceedings as an *fieri* until the judgment is given: so that a fine may now be amended or invalidated at any time during the term in which it is levied, by an application to the court of Common Pleas. ^{1 Inst. 260. a. 3 Com. 406.}

A writ of error is properly speaking a proceeding in the nature of an appeal, and therefore must be brought in a superior court; so that a writ of error to reverse a fine is usually brought in the court of King's Bench, because that court has an appellant jurisdiction over the court of Common Pleas. But where the error assigned in a judgment does not arise from any fault in the court, but from some defect in the execution of the process, or some matter of fact, it may be amended in the court of Common Pleas. ^{1 Roll. Ab. 746. Fitz. N. B. 21. 4 Inst. 22.}

With respect to fines levied before the justices of *Wales*, pursuant to the statute 34 & 35 *Hen. 8.* It is provided by that statute *s. 113*, that all errors therein shall be redressed by writ of error to be sued out of the king's chancery

chancery in *England*, returnable before the king's justices of his bench in *England*. And by the statute 43 *Eliz. c. 15. s. 6.* it is provided that all fines levied in the county of the city of *Chester* pursuant to that act, shall be subject to be reversed upon writs of error to be sued, and prosecuted before the high justice of the county palatine of *Chester*, as other judgments given in the *Portmoot* court.

*Who may
bring a Writ
of error,*
2 *Bac. Ab.*
537.

With respect to the persons who may bring a writ of error, it should be premised that no person has a right to reverse a fine, unless he can shew that upon such reversal he will be intitled to the land; for the courts of law will not dispossess the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title, until the right owner appears; besides, if the person who demands the reversal of the fine, cannot prove that he has a title to the lands of which the fine was levied, it follows, that he is not affected by it; and it would be trifling with courts of justice, for a person to seek relief who cannot make it appear that he has received an injury.

1 *Leon. 261.*

Thus, if a person who is seised *ex parte materna* levies a fine in which there is error, the heir *ex parte materna* will be intitled to a writ of error to reverse it.

Dyer 90. 2.

So if a tenant in tail female levies a fine which is erroneous, and dies leaving a son and a daughter, the daughter and not the son will be intitled to a writ of error to reverse it; because she is the person to whom the land ought to have descended.

1 *Leon. 261.*

The younger son, when intitled to the lands by the custom of *Borough English* shall bring the writ of error, and not the heir at common law, for this remedy descends with the land.

*Champer-
noon v. Go-
dolphin,*
Cro. Jac.
160.

In a writ of error to reverse a fine it is not however requisite, that the person who brings the writ should shew his title, unless it be in a special case varying from the common course, as where a writ of error is brought by a special heir in tail, or a person in remainder.

Dyer 89. b.
5 *Mod. 67.*

Although in general all the parties to a fine ought to join in the writ of error, yet there are some exceptions to this rule.

Piggott v.
Harrington.

Thus where husband and wife were tenants for life with remainder to an infant in fee, and they all joined in

in levying a fine. The infant alone brought a writ of error to reverse it on account of his nonage. It was objected, that since all had joined in the fine, they should likewise join in the writ of error; and that the husband and wife should be summoned and severed, and then the infant might proceed alone to assign errors. But it was adjudged, that the writ of error was well brought by the infant alone, because the error assigned was not in the record but without it, *viz.* in the person of the infant.

A writ of error to reverse a fine, must be brought against one of those who were parties or privies to it, and not against the tenant of the land only. But the court will not in general reverse a fine, unless a *scire facias* is returned against the persons who are then in possession; for the cognizees of a fine are frequently nothing more than trustees, and have no beneficial interest in the lands.

No person can have a writ of error to reverse a fine who took any estate by it, because no recoveror can bring a writ of error to defeat a record by which he himself has recovered: for the judgment in a writ of error is to avoid that which the plaintiff has lost.

It follows from this principle that in a fine *sur done* Idem. grant & render, the cognizor cannot assign error in the grant and render by which he himself took an estate.

A person may bar himself from bringing a writ of error in several ways. Thus if a man releases all his right in, or makes a feoffment of the land, whereof a fine was levied; he will be thereby barred from bringing a writ of error, because by his release or feoffment, he has forever excluded himself from the land: and no person can have a writ of error who is not intitled to the land. But if a person releases his right in, or makes a feoffment of, part of the land only, he may still reverse the fine as to the remainder.

If an infant brings a writ of error to reverse a fine levied by him during his infancy, and on inspection his nonage is recorded by the court; but before the fine is reversed, he levies another fine; the second fine will prevent him from reversing the first, because the second fine having entirely barred him of all the right to the lands, must also deprive him of all the remedies to restore him to them.

In

1 Leon. 317.
Cro. Eliz.
115.

Roll. Rep.
37.
Salk. 339.
Rep. Temp.
Holt. 614.
Hard. 163.

Rep. 39. b.

1 Roll. Ab.
788.

Hart's Case,
1 Roll. Ab.
788.

Cockman
v. Farrer,
T. Raym. 461.
Sir T. Jones
181.

Barton v.
Lever,
Mo. 365.
Poph. 100.

1 Roll. Ab.
757.
Ante p. 20.

Ante p. 29.

Dyer 89. b.
1 Roll. Ab.
757.

Wright v.
Mayor of
Wickham,
Cro. Eliz.
484.

Cockman v.
Farrer,
Sir T. Jones
181.
1 Roll. Ab.
757.

Arundel v.
Arundel,
Cro. Eliz.
677.

In a writ of error to reverse a fine, the defendant cannot plead the same fine which is attempted to be reversed, and five years non-claim in bar of the writ of error; *quia non valet exceptio istius rei cujus petitur dissolutio.*

A common recovery will bar the issue in tail, from bringing a writ of error to reverse an erroneous fine, because the estate tail being barred by the recovery, the issue in tail has no title to the land.

Nothing can be assigned for error in a fine, which contradicts the record, because the records of a court of justice are of so great credit, that they can only be defeated by matters of equal notoriety with themselves: and therefore, although the circumstances assigned for error should be proved by witnesses of the greatest credit, yet such evidence cannot be admitted.

Thus we have seen that where the entry of the king's silver before the death of the cognizor appears upon record, no averment can be made against it.

No averment can be made that the cognizor of a fine died before the teste of the writ of *dedimus potestatem*, because that contradicts the record, in which it is expressly stated, that when the commissioners took the acknowledgment of the fine, they were authorized to do it by a writ of *dedimus potestatem*.

Where a fine is acknowledged in court, the plaintiff in error cannot assign for error, that the cognizor died before the return of the writ of covenant, for that would directly contradict the record, because no fine is ever acknowledged in court, until the writ of covenant is returned; for until then the parties are not before the court. But if the fine is acknowledged before commissioners, it may then be averred that the cognizor died, before the return of the writ of covenant, or that after the acknowledgment, and before the return of the certificate thereof, the cognizor died; because these facts are consistent with the record.

Where a fine was acknowledged before *Roger Manwood*, Esq; one of the justices of the Common Pleas, and afterwards a writ of *dedimus potestatem* was directed to Sir *Roger Manhood*, (he having been knighted after the fine was acknowledged) who returned it with his name and title, and this circumstance was assigned for error, but it was not allowed, because it contradicted the record, by

by which it appeared that the writ of *dedimus potestatem* was directed to Sir *Roger Manwood*, who by virtue thereof took the acknowledgment.

It is said by Sir *Edward Coke* and others, that if there be tenant for life, remainder in fee to an infant, and they both join in levying a fine, which is afterwards reversed by the person in remainder on account of his infancy, yet that the cognizee shall have the lands, during the life of the tenant for life. But in the case of *Zouch v. Thompson* it was adjudged, that although a fine might be reversed as to part of the lands, and remain good as to the residue, yet that a fine could not be reversed *in toto* as to one person, and remain good *in toto* as to another.

The manner of reversing fines differs from that which is observed in reversing other judgments, for in those cases the record itself is removed into the court in which the writ of error is brought, because in adversary suits, errors cannot be assigned on a transcript of a record only, but in cases of fines the transcript only is removed, on which the errors are assigned, and if the fine is erroneous, the court of King's Bench may send for the record itself and reverse it, or else send a writ to the treasurer or chamberlain of the court of Common Pleas, to take it off the file.

By the stat. 23 *Eliz. c. 3. s. 2.* It is enacted, "that no fine shall be reversed for false or incongruous Latin, rasure, interlining, misentering of any proclamations, misreturning or not returning of the sheriff, or want of form in words and not in substance."

By the stat. 10 & 11 *W. 3. c. 14.* reciting that fines, recoveries, and judgments were reverfible at any time without restraint or limitation for any error or defect which happened therein, by the ignorance or carelessness of clerks, and sometimes by unavoidable accidents, it is enacted, "that no fine, recovery, &c. shall be reversed or avoided for any error or defect therein, unless the writ of error or suit for the reversing such fine, recovery, &c. be brought and prosecuted with effect, within twenty years after such fine levied, &c." The second section of this act saves the rights of infants, femmes covert, persons *non compos*, in prison, or beyond sea, notwithstanding the said twenty years be expired, so as they bring their writ of error within five years after their disabilities are removed.

In

In consequence of this statute a writ of error to reverse a fine must be brought within twenty years after the fine has been levied, and not within twenty years after a title has accrued, for the time when the fine was levied is the period from which the twenty years are to be reckoned.

Lloyd v.
Vaughan,
2 Stra. 1257.

Thus where a writ of error was brought, 10 Geo. 2. to reverse a common recovery, which was suffered 5 Anne, the defendant pleaded this statute in bar; the writ of error not having been brought within twenty years after the recovery was suffered; to which it was answered that the plaintiff's title did not accrue until the death of one of the vouchees without issue in the year 1739.—After several arguments, the court determined that the writ of error did not lie, because the statute 10 & 11 W. 3. was made to quiet possessions, and to fix a certain period beyond which fines and recoveries should not be impeached, for the words of the statute are express, "twenty years after such fine levied, or recovery suffered." And it has not the words which are in the statute of fines, viz. "after the title accrued." The *terminus a quo* is the time when the recovery is suffered; and if that was once exceeded there would be no knowing where to stop: a reversioner after an estate tail which had subsisted above a century, might upon this principle be allowed to reverse a common recovery; whereas persons in reversion were never the objects of the legislature's care, it was sufficient that they had a chance of the reversions vesting within the twenty years, in which case they might bring a writ of error, but not afterwards.

Writ of false
Judgment.
1 Inst. 288. b.

A writ of error can only be brought to reverse a judgment in a court of record; for to amend errors in a base court, which is not of record, a writ of false judgment lies.

Writ of De-
ceit.
Fitz. N. B.
98.
2 Inst. 216.
3 Comm. 165.
Rex v. Ser-
jeant Mead.
2 Wilson's
R. 17.
1 Roll. Ab.
775.
1 Leon. 290.

Where a fine is levied in the court of Common Pleas of lands held in antient demesne, the lord may reverse it by writ of deceit, and this may be brought by the lord, against the parties and *cestui que use* of such fine, and thereby he shall obtain judgment, not only for damages, (which are usually remitted) but also to recover his court, and jurisdiction over the lands, and to annul the former proceedings.

If a fine be levied of lands, whereof part are antient demesne, and part frank fee, and the lord in antient demesne

mesne brings his writ of deceit, the court of King's Bench, upon a view of the transcript of the record, and proof that part of the lands are antient demesne, will reverse the fine as to that part; they will not however order the fine to be torn off the file, as in cases where the whole fine is reversed, because it shall stand as to the lands which are frank fee; but will order a mark to be made on the fine, to signify that it is cancelled as to that part.

Where a fine, levied in the court of Common Pleas, of lands held in antient demesne, is reversed by writ of deceit, it is said to be doubtful whether the fine shall still hold good between the parties. Some say it does not become entirely void, nor is the cognizor restored to his land against his own solemn acknowledgment on record; especially since the lord who brings the writ of deceit seeks nothing but to restore the land to the privileges of antient demesne. Others hold that the writ of deceit and the reversal thereon, entirely avoids the fine, and restores the cognizor to the possession of the land: for the cognizance though on record shall be no estoppel, because it was made in a court which had no jurisdiction, and therefore the whole proceedings were *coram non judice*.

The lord of a manor held in antient demesne is not barred of his writ of deceit by the death of any of the parties to the fine.

Thus where a writ of deceit was brought by the lord of a manor, held in antient demesne to avoid a fine levied of lands held of him as of the said manor. It was argued for the defendant, that the cognizor and the cognizee being both dead, the lord could not now maintain an action of deceit, because it was only a personal action, and therefore died with the person. But it was resolved, that a writ of deceit did lie in such a case against the heir of the cognizor or cognizee, because it was a real deceit, and did not resemble the personal deceit of non-summons; and if the law were otherwise, the lord of a manor held in antient demesne would be for ever barred of his right of inheritance, in case the parties to such a fine should happen to die the day after it was levied.

In some cases the court of Common Pleas will vacate and set aside a fine upon motion, although the king's silver has been paid, and the fine completed, without putting the parties to the trouble and expence of a writ of error,

Fitz. N. B.

98.

1 Bac. Ab.

112.

10 Rep. 50.

2.

Zouch v.

Thompson.

1 Ld. Raym.

177.

Motion.

2 Show. Rep.

281.

error, in the same manner as they would set aside a judgment obtained by trick or surprise.

Hutchinson's
case, 2 Lev.
36.

Heatly v.
Pyott, Cases
of Pract. 12.

Watts v.
Birket ante
p. 27.

Plowd. 359.

2 Inst. 518.

2 Blackst. R.
994.

Thus where it evidently appeared to the court, that a husband had prevailed on his wife to levy a fine, she being but sixteen years old, the fine was vacated, and the exemplification was brought into court and delivered up, and the commissioners ordered to be prosecuted.

*Although a fine can only be reversed by a writ of error, yet its effects may be avoided in several other ways.

There were four modes of avoiding a fine at common law; two by matters of record, and two by acts in *pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied, and an entry of a claim on the record of the foot of the fine itself in this manner, *talis venit et opponit clameum suum*. Those by acts in *pais* were, a lawful entry upon the land by the person who had a right; and in case that could not be done, then a continual claim.

Action.

By the statute 4 Hen. 7. all those who are affected by a fine, must pursue their title by way of action or lawful entry; so that a claim entered on the record of a fine, would now be ineffectual. And an action commenced within five years after a fine has been levied, will be sufficient to avoid it, although judgment be not obtained within seven years afterwards. But such action must be prosecuted with effect; for if an action be commenced within the time prescribed, and afterwards discontinued, it will not avoid a fine.

1 Vent. 45.

2 Blackst. R.
994.
Dal. 116.

The action here spoken of must be a real action, so that an ejectment will not avoid a fine: nor is a bill in Chancery such a claim under the statute 4 Hen. 7. as will avoid a fine; for *Catlin*, Chief Justice in 16 Eliz. lays it down, that a claim to avoid a fine by bill in Chancery is not sufficient, but it must be by action.

1 Chan. Ca.
268. 278.
2 Black. R.
994.

There is however an exception to this rule, in the case where a fine has been levied of a trust estate, because no entry by the *cestui que trust*, nor claim or other legal act will be sufficient to avoid the fine, or suspend the bar arising from the non-claim; it can only be done by bill in Chancery, as the claim to avoid a fine ought to be of a nature which corresponds with the estate.

A fine

• *Modes of avoiding the Effects of a Fine.*

A fine may also be avoided by an actual entry made on *Entry.* the lands whereof the fine has been levied ; but if the right of entry be taken away and a right of action only remains, as where a fine operates as a discontinuance of the estate, there an actual entry on the land will not avoid the fine, but a real action must be brought. *Stapleton v. Sherrard* 1 Vern. 212.

A fine having been levied, the lessor of the plaintiff proved, that at the gate of the house in question, he said to the tenant, he was heir of the house and land, and forbade him to pay more rent to the defendant, but he did not enter into the house when he made the demand, on which it was agreed, that the claim at the gate was not sufficient. Then it was proved that there was a court before the house, and which belonged to it, and that though the claim was at the gate, yet it was on the land and not in the street, and that was holden good without question. *Skin. 412.*

The delivery of a declaration in ejectment does not amount to such an entry as will avoid a fine, even though the defendant appears to it, and confesses lease, entry, and ouster, for there must be an actual entry made *animus clamandi*, whereas in an ejectment there is only a fictitious or supposed entry, for the purpose of making a demise ; and the entry must be made before the time when the demise is laid. *1 Vent. 42. 3 Burr. 1897. Doug. R. 468.*

Thus, where a fine had been levied, and the person who had a right to the lands made an actual entry on the 6th *January*, 1731, and in the next *Hilary* term brought his ejectment, and laid the demise on the 1st *October*, which was three months before the actual entry. It was insisted for the defendants, 1st, That an actual entry was necessary to avoid the fine, and, 2dly, That the demise could not be laid before the lessor had regained the possession by the actual entry. The court was of opinion with the defendants on both these points ; and on a writ of error in the House of Lords it was argued for the plaintiff, that a fine with proclamations does not, by force of the statute 4 *Hen. 7.* operate as a bar to conclude strangers till after five years elapse without entry or action ; and therefore the verdict having found that the lessor of the plaintiff made his first actual entry on the 6th *January*, 1731, and before the declaration, he thereby avoided the operation of the fine, and was at liberty to lay the demise in

M

his

his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued; in the same manner as if his title had stood independent of such fine, so rendered ineffectual within the plain intent of the statute: And if such entry was not good to maintain this demise, it must follow, that in every case where a fine is levied by a wrong-doer, and not discovered till two, three, or four years afterwards, the intermediate profits between the time of levying such fine, and the entry of the lawful owner, must be absolutely lost, although the statute gives five years to enter, and an entry at any time within the five years, purges the disseisin and the wrong from the beginning, and brings the person so entering within the saving of the statute, to all intents and purposes.

On the other side it was said, that an actual entry is necessary to avoid a fine, before an ejectment can be brought, and it must also be before the time of the demise; because a fine is of that high nature, even at common law, that it dispossesses all persons claiming title, and consequently a lease to found the ejectment upon, cannot be made till the lessor regains the possession. As to the entries found by the verdict to have been made subsequent to the time of the demise, they were of no use in the present case; for the ejectment lease being originally void, could not be made good by any subsequent act; and therefore whatever effect those entries might have in other respects, they could not make the lease good. That the word *action* in the statute 4 Hen. 7. has always been understood to mean *real actions* which were then in use; and it has often been determined, that the bringing an ejectment is not sufficient to avoid a fine.

It appears from Sir John Strange's report of this case, that the question put to the judges were, 1st. Whether an actual entry was necessary to avoid a fine? 2d. Whether the demise being laid before the time of the first entry the ejectment could be maintained? To the first question they answered in the affirmative; to the second, in the negative; upon which the judgment was affirmed.

No entry is necessary where the fine is levied without proclamations, for the statute of 4 Hen. 7. does not extend to such a fine; and it may be avoided at any time within twenty years.

Jenkis v.
Richard.
Wils. R. 45

The

The entry to avoid a fine must be made by the person ¹ Inst. 258. a. who has a right to the the lands, or by some one appointed by him; for a person who has a right of entry may empower another to enter for him. But if a stranger makes an entry on lands whereof a fine has been levied in the name of a person who has a right to avoid the fine, without any preceding command, or subsequent assent, within five years, by the person who has the right, it will not be sufficient; for the statute 4 Hen. 7. bars all persons who do not claim within five years; by which means an election is given to all those who have a right at the time when a fine is levied, to claim or not, and a stranger cannot make this election for them.

Thus where a disseisor levied a fine with proclamation, the disseisee not knowing of it, and a stranger made an entry within five years, to the use of the disseisee, but the disseisee did not assent to it, until the five years had expired: it was determined by all the judges, that the assent of the disseisee to the entry, after the five years had expired, was not sufficient to render it valid, because the statute of fines ought to be taken strictly, being made for the establishment of repose and tranquillity. ^{Pollard v. Luttrell. Poph. 108. Ld. Audley's case, Moor 457. 9 Rep. 106. a.}

A person in remainder or reversion expectant on a lease for life or years, or the lord of a tenant by copy, may enter in the name of the tenant for life, the tenant for years, or the copyholder, to save those particular interests, as well as their own freehold and inheritance: and the entry of those particular tenants will also save the rights of the lord, the remainder man, or reversioner, on account of the privity of estate which is between them. Guardian by nurture, or in socage, may also enter in the name of his ward to avoid a fine, and such an entry will save his right. ^{Shep. Tou. 33, 34. 9 Rep. 109. a.}

The entry of one joint-tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine, as to the other joint-tenants, coparcener, or tenant in common.

By the statute 4 Ann. c. 16. s. 16. it is enacted, " That no claim or entry to be made of, or upon any lands, tenements, or hereditaments, shall be of any force or effect to avoid any fine levied, or to be levied, or to be levied with proclamations, according to the

“ form of the statute in that case made and provided, in
 “ the court of Common Pleas, or in the courts of sessions
 “ in any of the counties palatine, or in the courts of
 “ grand sessions in *Wales*, of any lands, tenements, or
 “ hereditaments ; or shall be a sufficient entry or claim
 “ within the statute of limitations, unless upon such en-
 “ try or claim an action shall be commenced within one
 “ year next after the making of such entry or claim, and
 “ prosecuted with effect.”

Plea.

The proper mode of reversing a fine for any defect in the record is, we have seen by writ of error : but where a fine is void *ab initio*, either as to all mankind, or as to some particular persons, its effects may then be avoided by plea.

Thus where none of the parties to a fine have an estate of freehold in the lands whereof it is levied, such fine is totally void as to all strangers, and may be avoided by pleading, *quod partes finis nec eorum aliquis tempore levationis finis, nihil habuerunt, nec eorum aliquis habuit, &c. sed quidam J. S. cujus statum ipse habet.*

Dyer 215. b.
 Co. Read. 12.
 2 Inst. 523.

Bracton 436.
 b.

This mode of avoiding a fine seems to have been already established in the time of Bracton. *Excusatur etiam qui quod clameum non apposuerit, scilicet ubi finis ipso jure sit nullus, ut si factus fuit de tenemento quod alius tenuit, ut si ipse qui debuit clameum apposuisse, vel antecessor suus, fuit in seifina de eadem re quando finis factus fuit, et non ille vel antecessor suus qui finem allegat.*

Rot. Parl.
 vol. 2. p. 122.

The plea *quod partes finis nihil habuerunt* might originally have been pleaded by any person who was not a party to the fine ; and there is a very long case in the rolls of parliament, 14 *Edw.* 3. No. 31. in which it was determined, that a stranger should be allowed this averment. But by the statute 4 *Hen.* 7. parties and also privies to a fine are deprived of this plea ; and as it is now determined, that the issue in tail are meant by the word *privy*, it follows, that they cannot avoid a fine on this ground.

Fraud.

Bract. 436. b.
 437. a.

By the common law a fine might be avoided on account of any fraud in the parties who levied it. *Excusatur etiam quis quod clameum non apposuerit, — si finis factus fuerit per dolum et fraudem vel alio modo in alterius præjudicium, quod finis tenere non debeat.*

Thus

Thus in 29 *Eliz.* one *Hubert* was convicted in the Hubert's case Star Chamber upon a bill exhibited against him for procuring one *Webster* to acknowledge a fine in the name of *Alexander Gellibrand*, (who was then beyond sea.) The sentence was, that he should be fined and imprisoned, and that the fine thus levied should be avoided (if it could be so done) by entering a *vacat* on the roll, or otherwise as the justices of the Common Pleas should be approve; and if it could not be so made void, that then *Hubert*, by fine or otherwise, as *Gellibrand* might devise, should reconvey the land to him and his heirs.

Soon after the Restorations doubts were entertained respecting the power of parliament to set aside a fine obtained by force and fraud. A bill having been brought into the House of Lords to vacate certain fines unduly procured to be levied by Sir *Edward Powell* and dame *Mary* his wife; the house commanded the judges to deliver their opinions thereon in point of law: the Lord Chief Justice of the King's Bench delivered it as his opinion, and all the rest of the judges, to be,—“ that they “ did not find by any record or precedent in their law “ books of any fine which had been perfected, that had “ been vacated for fraud or force in parliament, or any “ other place.” The question was then put, whether the fine was obtained by force? and it was resolved in the affirmative. The bill passed, but the following protest was entered, signed by Lord Chancellor *Hyde*, and several other lords—“ That fines are the foundations of “ the assurances of the realm, upon which so many titles “ depend, and therefore ought not to be shaken, nor “ hath there any precedent occurred to us wherein any “ fines have been vacated by judgment or act of parliament, or otherwise, without consent of the parties; “ the eye of the law looking upon fines as things always “ transacted by consent, and with that reverence, that “ no averment whatsoever shall be against them when “ they are perfected.”

In the House of Commons counsel were heard for and against this bill, and the house being satisfied that they had full power and jurisdiction of the cause, the bill passed.

A fine may also be avoided by an averment of fraud in consequence of the statute 27 *Eliz. c. 4.* where it appears

Cro. Eliz.
531.
12 Rep. 123.
5 Rep. 68. b.
Co. Read. 7.

Lords Journ.
vol. 11. p.
291.
12 Car. 2.

Idem p. 209.

Commons
Journ. vol.
8. p. 344.
13 & 14 Car.
2. c. 27.

3 Rep. 80. a.
Shep. Ton. 18.
to Jenk. 254.

to have been levied to secret uses, for the purpose of deceiving purchasers; or by an averment of usury under the statute 13 *Eliz. c. 8.*

*Courts of
Equity.*

Although a fine duly levied is as effectual and binding in a court of equity, as in a court of law, because it is one of the common assurances of the realm, and was originally instituted for the purpose of securing those who were in possession of lands; yet if any fraud or undue practice appears to have been used in obtaining a fine, the court of Chancery has then a power of relieving against it, as much as against any other conveyance, for although it might be extremely improper and inconvenient to admit of an averment in a court of common law, against a fine obtained by fraud, because it would be dangerous to permit the evidence of a record to be questioned in any case whatever; yet as there is a method in which relief may be given in cases of this kind, without contradicting the principles of the common law, it is highly proper that a court of equity should adopt it, and the Lord Chancellor appears to have exercised this jurisdiction as early as the reign of Queen *Elizabeth.*

*Welby v.
Welby,
Tothil 99.*

The court of Chancery however does not absolutely set aside a fine so obtained, nor does it send the party aggrieved to the court of Common Pleas, to get it reversed; but it considers all those who have taken an estate by such a fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a reconveyance of the lands, on the general ground of laying hold of the ill conscience of the parties, to make them do that which is necessary for restoring matters to their situation. But with respect to any technical error in a fine, or irregularity of the commissioners who have taken the acknowledgment of it, it is a matter only cognizable in the court of Common Pleas, because a fine being of the same nature as a judgment is properly examinable in that court only where it is entered.

*Wright v.
Booth, Tothil
101. St. John
v. Turner, 1
Ab. Eq. 259.
1 Vesey 289.
Clark v. Ward,
Prec. in Cha.
150.*

*1 Brown 137.
Woodhouse v.
Brayfield,
2 Vern. 307.*

Thus, where a person having prevailed on a woman to levy a fine of some houses, and to execute a deed declaring the uses thereof to himself and his heirs, it being proved that the woman, at the time of levying the fine, declared that she must make use of some friend's name in trust for herself, and she having afterwards declared in her

her will, that she only levied the fine for the better enabling her to dispose of her estate, and having devised it to J. S. subject to the payment of her debts: the court of Chancery decreed, not only that the lands were liable to the debts of the testatrix, but also that the person to whose use the fine was declared, should convey the houses to J. S. according to the will.

Where a fine is levied by a person who has got into a possession under a forged deed, a court of equity will not allow it to have any operation. 2 Atk. 381.

If tenants give a conditional possession only, provided they may pay their rents to a third person, until a suit is determined: a fine levied under such a possession will not in a court of equity be allowed to have any operation. Idem. 390.

By the common law if an infant or idiot, has by any neglect or contrivance been permitted to levy a fine, his declaration of the uses thereof will be good, so long as the fine remains in force; and if the fine is never reversed, his declaration of the uses will be binding and conclusive on him and his heirs for ever; because the law will not presume that a fine, which is a solemn act on record, has been levied by a person labouring under such disabilities, and therefore until the fine, which is the principal, is annulled, the declaration of the uses thereof will remain good. Thus stands the common law on this point; but as the court of Chancery has, in many instances, compelled persons who had obtained estates under a fine in a fraudulent manner, to re-convey them to those who were really intitled thereto: so, that court will interpose its authority in cases of this kind, and not suffer the declaration of uses of a fine levied by an idiot to bar his heirs; as no species of fraud can be more evident, than that of obtaining a conveyance from a person of this description. 2 Rep. 58. n. 10 Rep. 42. b. 12 Rep. 124. Hobart 224. 1 Vesey 304. Rushley v. Mansfield, 10th 42.

Thus, where one *Addison* by a first and second inquiry was found a lunatick in 1706 from the year 1689, without any intervals. The defendant had got a mortgage, and at last an absolute purchase at great undervalue, by deeds, fines, and recoveries, the court set aside the purchases. Addison v. Dawson, 2 Vern. 678.

In the case of *Rochfort v. the Earl of Ely*, which was heard in the House of Lords in the year 1775, on an appeal from the court of Chancery in *Ireland*, and of which the

the reader will find a full account in the appendix to the Essay on Recoveries, the House affirmed the decree of dismissal of the court of Chancery of *Ireland*, upon the ground that the Earl of *Ely* had a sufficient capacity in law to do any act over his estate,; and not in consequence of any doubts respecting the jurisdiction of courts of equity to controul the legal operation of fines and recoveries, or direct the uses of them according to equity and conscience.

A court of equity will not suffer a fine and non-claim to bar any charge on lands where the person who levied the fine had notice of such charge.

Draper's
Company v.
Yardley,
2 Vern. 662.

Thus where a person to whom lands were devised chargeable with legacies, levied a fine, on which there was five years non-claim, and afterwards granted a rent charge and mortgaged the lands. It was decreed that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have had notice of them.

A fine levied by a trustee will not be allowed to affect the interest of the *cestui que trust*.

1 Vern. 149.

Thus in the case of *Bovey v. Smith*, the Lord Keeper put this case to Serjeant *Maynard*,—"A. seised in fee in trust for B. for full consideration conveys to C. the purchaser having notice of the trust; and afterwards C. to strengthen his own estate levies a fine. Whether B. the *cestui que trust* be not in that case bound to enter within five years? and the counsel were all of opinion, that he was not; for C. having purchased with notice, notwithstanding any consideration paid by him, was but a trustee for B. and so the estate not being displaced, the fine cannot bar."

3 Atk. 563.

So in the case of *Shields v. Atkins*, Lord *Hardwicke* says, it would be dangerous, where a person enters on the foot of a trust, and never make any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of Lord *Pomfret v. Lord Windsor*, his lordship observed, that a court of equity would not suffer a fine levied by a trustee, to bar an equitable right: and that if a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of parliament.

2 Vesey 482.
2 Atk. 531.
S. P.

It

It is a principle of equity, that if a stranger enters upon an infant's estate and receives the profits, he shall be looked upon as a trustee for the infant. 1 Vern. 293.
2 Vern. 342.

Thus where *A.* devised lands to trustees until his debts were paid, then to an infant and his heirs, the defendant entered on the estate and levied a fine; five years past, the infant brought an ejectment as soon as he had attained his full age, but was barred by the fine and non-claim. He then brought his bill in Chancery, where it was determined that although the fine and non-claim was a good bar at law, the legal estate being in the trustees who were of full age and ought to have entered, yet that the plaintiff ought not to suffer for their laches, being an infant. The court decreed the possession, and an account of profits, declaring the fine and non-claim should not run upon the trust in the infant's minority, nor he suffer for the laches of his trustee. Allen v.
Sayer.
2 Vern. 368.

A mortgagor cannot bar a mortgagee by a fine and non-claim: for although the mortgagee be in reality out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so, while the interest is paid: It would be against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security. 1 Vent. 82.
1 Lev. 272.
2 Vesey 482.

A fine and non-claim by a mortgagee in possession will not, from the same principle, bar the equity of redemption.

Thus where a fine and non-claim was pleaded to a bill brought for the redemption of a mortgage, the plea was over ruled. Welden v.
Dux. Ebor.
2 Vern. 132.
1 Vern. 189.
Contra.

Where a fine is levied pursuant to a decree of the court of Chancery, for a particular purpose, that court will not permit it to operate farther than the decree directs. Goodrick v.
Brown.
1 Chan. Ca.
49.
2 Vern. 56,

The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine.

Thus, where Sir *John Trevor*, in consideration of his marriage, entered into articles to settle his estate, Trevor v.
Trevor,
to

1 P. Wms:
622.

2 Brown 122.
Bingham v.
Hussey,
Rep. in
Chan. S. P.

to the use of himself for life, without impeachment of waste; remainder to his intended wife for life; remainder to the use of the heirs males of his body by the said wife; remainder to his own right heirs; the marriage took effect, and Sir *John Trevor* had issue four sons, but no settlement was ever made pursuant to the articles.

Sir *John Trevor* supposing himself to be tenant in tail under the articles, levied three fines of the lands, and declared the uses of them to himself for life, remainder to his second son in tail, and afterwards died intestate, by which means a considerable real and personal estate devolved to his eldest son, who, notwithstanding, filed his bill, praying a specific performance of the articles. The second brother pleaded, among other things, the fines and five years non-claim; but it was decreed, that the lands comprised in the articles should be conveyed to the eldest son in tail, and this decree was affirmed in the House of Lords.

The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

Holt v.
Lowe,

4 Brown 253.

William Lord Brereton being seized in fee of the impropriate rectory of *Middlewich*, and of the advowson and vicarage of the said church as appendant to the rectory, agreed with *Robert Lowe* to convey the same to him; and in pursuance to this agreement the said *William Lord Brereton* and *Elizabeth* his wife, and *William*, their son and heir apparent, in 1664 levied a fine *sur consuance de droit come ceo*, &c. in consideration of 1000*l*, therein mentioned to be the purchase money, in the court of county palatine of *Chester*, to the said *Robert Lowe*, and to *Edward Minshall*, *Gabriel Hodgson*, and *John Wilson*, (who all three died in *Lowe's* life-time) and to the heirs of the said *Robert Lowe*.

About the year 1702, *Samuel Lowe*, the son and heir of *Robert Lowe* presented a clerk to the vicarage of *Middlewich*, who was instituted and inducted, and continued in possession till his death, which happened in the year 1718, when *Francis*, Lord *Brereton*, presented his clerk to the vicarage, who was instituted and inducted. *James Lowe*, the respondent's brother, brought a writ of *Quare Impedit*, but before the matter was determined

terminated the incumbent died, and the respondent, *Lowe*, presented his clerk, who was instituted and inducted. And the appellants brought their writ of *Quare Impedit*, to recover that turn of presentation, claiming the same under a conveyance from the family of *Brereton*.

The respondent, *Lowe*, having pleaded his title to the rectory and vicarage under the purchase and fine above-mentioned; the appellants in *Easter* term, 1734, exhibited their bill in the court of Exchequer against the respondent, setting forth that *William* Lord *Brereton* being minded to sell the glebe and tithes of the said rectory, the respondent's grandfather, who was then bailiff to Lord *Brereton*, prevailed on him, his lady and son, for some small sum of money, to sell and convey to the said *Robert Lowe* the glebe lands and tithes of the greatest part of the said parish; and other parcels of the said tithes were about the same time purchased by several other persons, and conveyed to them, and the said *Robert Lowe*, as part of the consideration for the purchase of the said tithes, agreed to take upon himself the payment of the stipend of nineteen marks to the vicar: but neither he nor his son ever pretended or insisted on any right to the advowson of the vicarage, nor ever attempted to present thereto, except in the year 1702, when *Samuel Lowe* taking advantage of *John* Lord *Brereton*'s being then under a commission of lunacy, presented a clerk. The appellants therefore prayed that the respondent might discover whether there was not some deed wherein the uses of the fine were declared, and whether a subsequent fine of particular parcels of the rectory was not levied in 1667, and deeds executed declaring the uses thereof.—In bar to this discovery the respondent pleaded the purchase so made by *Robert Lowe* his grandfather, and the fine thereupon levied to him of the said rectory, and the advowson of the said vicarage; and also the payment of the sum of 1000*l.* the purchase-money mentioned in such fine. That proclamations were duly made on the said fine, and that no claim was made to the premises within five years next after. That the respondent and those claiming under him, enjoyed the premises for fifty years and upwards, and insisted on the statute of limitations.

On

On the 9th of *November*, 1734, this plea came on to be argued before the Barons, when they ordered that the plea should be allowed.

An appeal was then brought in the House of Lords, and on behalf of the appellants it was argued, that the fine insisted by the plea to have been levied to *Robert Lowe, Minshall, Hodgson, and Wilson*, was not levied with an intention to convey the rectory to the conusees for their own use, but only to clear the title to the rectory, which was then intended to be sold in parcels; and as there did not then appear to be any declaration of the uses of this fine, it would, by the rules of law, result to the conusors. That the end of the bill was to discover the intent and design of the said fine, and of a subsequent fine, said to have been levied in 1667 to the said *Robert Lowe*, of divers parcels of the said rectory; and by the discovery of this second fine, and the uses of it, and the consideration of such conveyance, to shew that the uses of the first fine did result to the conusors, or at least, as to such parts of the rectory as were not particularly conveyed by the second fine, and the deeds declaring the uses of it; and therefore the first fine ought to have been pleaded in bar to such discovery, without a denial of the particular circumstances charged by the bill, as an evidence of such resulting use. That the respondent, by not answering or denying the several charges in the bill, touching the second fine, and the declaration of its uses, did implicitly admit the same, and that the advowson of the vicarage was not comprized therein; and this admission was a strong evidence against him to shew, that the first fine was levied only for the purpose above-mentioned, and that nothing more was intended to pass to his ancestor, than what was particularly comprized in the second fine, and the declaration of the uses thereof. That it did not appear by the plea, what was the real purchase-money of the advowson, nor that the same was paid by *Robert Lowe*, the respondent's ancestor. That the appellants and the respondent derived under the same title, and the right of the appellants to the advowson appeared from the respondent's own conveyances; the pretence therefore of his ancestor's being a purchaser, without any notice of the appellants title, was without foundation. And

as

as to the quiet enjoyment, the fine and non-claim, and the statute of limitations, set up as a bar to the discovery fought by the appellants; it was said, that as to the glebe, and such part of the tithes, parcel of the said rectory, as the respondent claimed, there might have been a long and quiet possession, nor was his title thereto at all impeached by the appellant's bill; but as to the advowson of the vicarage, the only evidence of enjoyment insisted on by the respondent, was a presentation about the year 1702, which was during the lunacy of Lord *John*; and since that time Lord *Francis*, his heir, presented the last incumbent, and regained the possession of the vicarage. It was therefore hoped, that the said plea should not bar the appellants of a full discovery of the respondent's title; but that the order for allowing the same should be reversed.

On the other side it was contended, that *Robert Lowe*, the respondent's grandfather, and under whom he claimed, was a purchaser of the rectory and the advowson of the vicarage, by the fine levied in 1664, for 1000*l.* without any notice of any other title: and therefore, by the known and established rules and practice of courts of equity, the respondent ought not to be obliged any further to discover or disclose his title; nor were the appellants entitled to the aid of a court of equity in respect to such title. That by the fine, proclamations, and non-claim thereupon, and by the length of peaceable possession and enjoyment, which the respondent's grandfather, father and brother, and those claiming under them, had successively of the said advowson, under the said fine and purchase; the title under which the appellants, by their bill, claimed the same, was utterly and effectually barred and defeated both at law and in equity; and therefore the order for allowing the plea ought to be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, it was ordered and adjudged, that the order therein complained of, should be reversed; and that the plea should stand for an answer, with liberty to except so far, as to oblige the respondent to discover any conveyance or conveyances made by *William Lord Brereton* and *Elizabeth* his wife, and *William Brereton*, Esq; their son, or any or either of them, to *Robert Lowe*, the respondent's grandfather,

grandfather, alone, or jointly, with any other person or persons; and to discover any deed or deeds, declaring the uses of a fine, in the pleadings mentioned to be levied in the 10th year of King *Charles 2.* or declaring the uses of a fine in the pleadings also above mentioned to be levied in the year 1667.

Although a bill in equity is not such an action as will avoid a fine, if the subject matter of the suit be of legal jurisdiction: yet still in some instances, the filing a bill in a court of equity, will prevent the bar arising from a fine and non-claim: and in cases of this kind the court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiff's claim, upon the same principle that a court of equity sometimes directs that the defendants in a suit at law, shall not plead the statute of limitations.

2 Atk. 389.
390.

Pincke v.
Thornycroft,
Brown's Rep.
in Chan. 289.
Printed Cases
Dom. Proc.
1784.

Sir John Thornycroft, Bart. being intitled to the remainder in fee of the estates in question, expectant on the decease of his sister *Elizabeth* the then wife of General *Handasyde*, devised the same to *Henry Foster* in fee. After the decease of *Sir John Thornycroft*, disputes arose between *Mrs. Handasyde*, who was heir at law of *Sir John Thornycroft* and *Mr. Foster*, respecting the validity of this will, which were compromised, and *Mr. Foster* in consideration of 630*l.* conveyed all his interest in the estates devised by the said will to General *Handasyde* and his wife in fee as joint-tenants. *Mrs. Handasyde* survived her husband, and having no issue, she devised among other estates, "her estate and manor of *Stockwell*, in "the parish of *Lambeth*, in the county of *Surry*, and all "thereunto belonging to *Henshaw Thornycroft*, and his "heirs-male, and appointed him her executor." Upon the death of *Mrs. Handasyde*, *Henshaw Thornycroft* entered into possession of all the estates whereof she was seised, among which was a farm situated in the parish of *St. Mary Newington*, but which was not within the manor of *Stockwell*, and therefore did not pass by the will, and in *Hilary*, 1773, levied a fine and suffered a recovery of all those estates in order to bar the intail.

Previous to this, *Elizabeth Pincke* and *Ann Thornycroft*, who were the heirs at law of *Mrs. Handasyde*, filed their bill in the court of Chancery against *Henshaw Thornycroft*, praying, that the said *Thornycroft* might set forth the

the

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the dates and short contents of all the deeds, evidences, and writings in his custody or power, relating to the estates whereof Mrs. *Handasyde* died seised; and that he might likewise set forth and discover of what lands of the said Mrs. *Handasyde* he was in possession, which were not comprised in her will, and for an account of the rents and profits of the said premises received by him since the decease of Mrs. *Handasyde*, and for a delivery of all deeds relating thereto.

The defendant by his answer denied being in possession of any estates belonging to Mrs. *Handasyde*, but what were comprised in her will.

The heirs at law soon after discovered, that the farm at *Newington* was not devised by the will, and therefore brought an ejectment for the recovery of it. Notice of trial having been given just before the summer assizes 1778, a few days before the trial was to come on, the solicitor for the defendant informed the solicitor for the plaintiff of the will of Sir *John Thornycroft*, and that the production of that will, and setting up the title of *Henry Foster* under it, would non-suit the plaintiff in ejectment, but did not mention the fine or the deed by which *Foster's* title was conveyed to Mrs. *Handasyde*, that deed being in fact not then discovered. The heirs at law gave notice of trial for the Lent assizes 1779, when *Henry Thornycroft* set up the fine and non-claim; and there having been no actual entry, the plaintiffs were nonsuited. Upon this the plaintiffs filed a bill of revivor and supplement, prying, that under these circumstances the defendants might be restrained from setting up the fine in any manner to the prejudice of the plaintiffs.

The case was heard before the Lords Commissioners, *Loughborough*, *Ashurst*, and *Hotham*; and on behalf of the plaintiffs it was contended, that they should have proceeded to trial at the summer assizes 1778, which was before the expiration of the five years, if they had not been prevented by the information of the solicitor; and therefore this was a proper case for the interference of a court of equity. They insisted further, that the filing of the bill in the court of Chancery was of itself sufficient to prevent the bar, arising from the fine and non-claim taking place.

For

For the defendants it was urged, that there was no impropriety in the solicitor's conduct; that the court would not interfere to prevent the operation of a fine, unless in cases of fraud; and that the bill being in substance a mere bill for discovery, could not operate to prevent the bar arising from the fine.

Lord *Loughborough*.—"If it were made out that the plaintiffs were prevented from trying their cause by fraud, I should think, under the principles of this court, the defendants ought to be restrained from setting up the fine as a bar; but here the plaintiffs take it for granted, that a bill filed in this court for any purpose, will prevent the statute of limitation, or a fine barring. All legal interests are bound by the fine: If the subject matter of the suit be of legal jurisdiction, the bringing a suit in equity will not bar the operation of the fine. If a demand of a debt be made here, if it be a legal debt, this court being applied to for a discovery, will not prevent the statute of limitations from running; but if it be for payment out of assets, for which this is the proper jurisdiction, there the filing of the bill is the commencement of a proper suit. I do not say, that a case may not exist where the bad faith of parties may make a ground to prevent a fine from barring; but here was only a communication of the truth of the case; the attorney stated all he knew: It was not in proof that it was in consequence of this they did not try the cause. It was their own judgment that decided upon it. A legal bar has taken place in consequence of a legal provision; whether that provision be wise or not, it must bind. No hardship has occurred, in consequence of which they can say, that in conscience the fine should not be set up. This is a legal title, over which this court has no jurisdiction, and no fraud has intervened. The bill must therefore be dismissed."

Lord Commissioner *Aschurst*.—"I am of the same opinion,—where a bill is filed, with a prayer for equitable relief, the policy of the law suspends the statute of limitations; just as in the case of the commencement of an action. But with respect to a fine the case is different, the bringing an action is not sufficient to
"bar

“ bar the operation without any actual entry ; no more
 “ can the bringing a suit here be so, unless the entry
 “ was prevented by fraud. In any other case the filing
 “ the bill cannot prevent the bar, and in this case there
 “ was no fraud, but a fair disclosure.”

Lord Commissioner *Hotbam*.—“ If the filing of the
 “ bill is not a sufficient bar, it will stand on the circum-
 “ stances of the case. It was a mere bill of discovery,
 “ which is not sufficient. If the circumstances are such,
 “ that there had been an imposition of the party, I think
 “ the court should interpose, but it was a fair candid
 “ conversation.” The bill was dismissed.

An appeal was brought from this decree to the House Printed Cases
 of Lords, and on behalf of the appellants it was said, that 1784.
 it belongs to the jurisdiction of courts of equity, not on-
 ly to give relief where the party intitled to the lands has
 a title only in equity, but also where the plaintiff in
 equity has the legal estate, and can recover at law,
 provided the deeds which are evidence of his title are
 in the hands of the defendant in possession of the lands.
 The court in such cases relieves by decreeing a produc-
 tion of the deeds upon a trial at law, by restraining
 the defendant from setting up satisfied terms ; and (in
 case an account of the rents is also prayed) will, after
 a recovery at law, by the aid of the court, decree an ac-
 count of rents and profits. In like manner where the
 plaintiff has the title at law, and can make it out at law,
 without any aid from deeds in the defendant's hands ;
 yet if the defendant has in his hand an instrument which
 will defeat the plaintiff's legal title, and has also another
 instrument in his hands which will restore the plaintiff's
 title, equity will either decree the defendant not to give
 the first instrument in evidence at law, or to produce
 both. This is the present case ; for the plaintiffs, as heirs
 of *Elizabeth Handasyde*, could make out their title at
 law to the lands, which did not pass by her will, with-
 out any aid, by proving their pedigree : But it was in
 the power of the defendant to nonsuit the plaintiffs, by
 shewing, that Sir *John Thornycroft* was in his life-time
 seised of the estate in question, and that he devised it to
Foster, whereby *Elizabeth*, his sister and heir at law,
 was disinherited. But by the conveyance of 1745 from
Foster to *Elizabeth* in fee simple, and the production of
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it at law, the plaintiffs would be reinstated in their title as heirs to *Elizabeth*. The original bill was brought for a production and inspection of all the title deeds by the heirs of *Elizabeth Handasyde* against the devisee, to which production the heir was intitled. And the plaintiffs presuming that some aid of the court might appear to be finally necessary to try the title at law, the bill prayed an account of rents and profits and delivery of the deeds belonging to the descended estates. In the course of pursuing and obtaining this discovery, it came out, that Sir *John Thornycroft* the son made a will, and devised to *Foster*, and it also came out by the last answer, that *Foster* had conveyed to *Elizabeth Handasyde* in fee. It also came out that the lands in question were comprised in an old settlement 1722, and in a term of five hundred years thereby created for raising annuities, which had been satisfied, but the term remained outstanding; subject to which term, Sir *John Thornycroft*, the son, took the lands in question. So that it was undoubted, that if there were no other circumstances in the case, the court had a jurisdiction, and should have decreed upon the hearing of the cause, that the bill should be retained, with liberty for the plaintiff to bring an ejectment, that the defendants, the devisees, should not set up the term of five hundred years; and, in case the will of Sir *John Thornycroft*, the son, should be produced in evidence, the defendants should likewise produce at the trial the deed of 1745, and that all further directions should be reserved till after the trial was had.

The only circumstances in the present case which differed from the above, and which were the grounds of dismissing the bill, were, that in *Hilary* term 1773, (the next after the death of *Elizabeth Handasyde*) the devisee levied a fine of all the devised estates, and also of the descended estates (having entered upon both immediately after her death.) The original bill was filed in 1776. The five years non-claim ran from *Michaelmas* 1778. In *October* 1781, the answer came in which discovered the deed of 1745, and admitted it to have been in the hands of the devisee from the time of the death of *Elizabeth Handasyde*; and the answer also stated and insisted upon the fine and non-claim. The cause was heard the first

first of July 1783, at which time the court should have added to the directions above-mentioned, That the fine and non-claim should not be insisted upon at law, instead of dismissing the bill upon the ground of such fine and non-claim only, as the non-claim had elapsed pending the suit in Chancery, and therefore the court ought not to have permitted the defendant to take advantage of it at law.

For a court of equity will not suffer the rights of the parties to be changed, pending the suit in a case within the jurisdiction of the court, and where the court can relieve; therefore if a trust estate is before the court in a *lis pendens*, and a sale be made of the trust estate, without actual notice of the cause to the purchaser, the court at the hearing will decree the relief against the purchaser, which the plaintiff in the cause was intitled to. But it is otherwise after the cause is at an end, for then the party must have express notice of a decree, as he must of a judgment at law, to affect him with equity. So in the case of a fine, equity will not suffer a non-claim completed, pending the cause, to prevent the court from doing equity; otherwise (as Lord *Hardwicke* expressed it in 2 *Atk.* 390.) it would trip up the jurisdiction of this court, if you will not allow (where it is a proper matter of equity) a bill to prevent the running of a fine. So where a court of equity has directed an action, the defendant has been restrained from setting up the statute of limitations, which has run pending the suit in equity.

On the other side it was contended, that the title of the appellants, if they ever had any, was a clear title at law; it needed no assistance of a court of equity to bring it to a fair discussion: and accordingly the mother of the appellant *Pincke* and the appellant *Thornycroft* brought an ejectment, which might have been fairly tried without any such assistance; and there was now no obstacle to a legal determination of the rights of the appellants, except the fine.

That there was no ground for a court of equity to interpose, to remove the legal bar created by the fine. It was apprehended the farm at *Newington* was devised by the will; but supposing the contrary, there was not in the case any circumstance which could give a court of equity a controul over the legal title of the respondents,

nothing which could form a legal obligation upon their conscience, not to set up the fine. The appellants attempted to impute fraud to the respondents or their solicitor; but the bill did not state such a case as warranted the imputation, much less was it made out in proof. A fine was a matter of record open to the inspection of every one; the legislature had given it an operation to bar all claims not asserted in due time, and it was therefore the duty of every person having a claim, to inform himself whether there might be such an impediment to the assertion of it. Not disclosing to an adversary that a fine had been levied, which might in time be a bar to his claim, could not be deemed a fraud. It was endeavoured, therefore, to give to the conversation of the solicitor for the defendant and the solicitor for the plaintiff in the ejectment (of which there was no evidence but the answers) such a turn as might make it appear something like fraud. But the solicitor for the defendant merely mentioned a claim made by persons to whose apparent title he was then unable to give any answer, and which had therefore excited in his mind much apprehension for his client's title; and what he communicated was not only true, but (according to the information he then had) was the whole truth, though a subsequent accidental discovery put an end to this alarming claim, which, if it had prevailed, was superior to the title of the heirs, as well as of the devisee of Mrs. *Handasyde*. It was true, the heirs countermanded their notice of trial of ejectment, but their own judgment decided their conduct.

It was asserted by the appellants, that if the ejectment had proceeded to trial, the fine must have been discovered, and five years not having then elapsed from the last proclamation, the heirs might have entered to avoid the fine. But this assertion was not founded in truth; the will of Sir *John Thornycroft* would have been a sufficient defence, and there would have been no necessity for setting up the fine.

It was ordered and adjudged, "That the said decree
 " or order of dismissal complained of in the said appeal
 " should be reversed. And it was further ordered and
 " adjudged, that the bill should be retained for twelve
 " months, and that the plaintiffs should be at liberty in
 " the

28th Feb.
 1785.

“ the mean time to bring such action or actions at law
“ as they should be advised, &c. And it was further
“ ordered and adjudged, that the said defendant *Edward*
“ *Thornycroft* should not insist in such action or actions,
“ or on any trial to be had thereon, on the fine men-
“ tioned in the pleadings, or on any non-claim which
“ had ensued thereon, or any other fine or non-claim
“ which might have incurred since filing the original
“ bill.”

the most time to bring such action or actions as law
 as they should be secured, the And it was further
 ordered and adjourned until the 1st of January 1881
 the next time to bring such action or actions as law
 on the first to be had thereon, on the first
 of the month, or on any other day which
 shall be chosen thereon, or any other day or day
 which might have occurred from being the original

